Supreme Court, U.S.
FILED
071494 MAY 27 2008
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No.

IN THE

Supreme Court of the United States

MEHRDAD SABZEVARI, PETITIONER

v.

THE RELIABLE LIFE INSURANCE COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

One of our founding fathers stated that the United States should be "[a] government of laws and not of men." John Adams, Novanglus Papers," no. 7.- *The Works of John Adams*, ed. Charles Francis Adams, vol. 4 p. 106 (1851).

The law in the current case is that all facts are to be interpreted in the light most favorable to the nonmoving party. *Wilkerson v. McCarthy*, 336 U.S. 53, 57 (1949). The applicable law, and not the will of the court, should be the determinative factor not only in the current case, but in any case. See *Hunt v. Cromartie*, 526 U.S. 541, 552 (1999). The basic question for the lower court is whether there are sufficient facts that a reasonable jury could infer in favor of the nonmovant. *Anderson v. Liberty Lobby, Inc.*, 106 S.Ct. 2505, 2511 (1986). If the answer is yes, then the court must leave the matter for the trier of fact to decide. The reason for this is quite simple, we are a republic based on decisions by a jury of our peers - not decisions by judges. As Justice O'Connor stated "a good judge applies the law as it is, not as she wants it to be." Justice Sandra Day O'Connor, "How to Save our Courts", Parade, February 24, 2008, p. 4.

In 2006, the Supreme Court recognized the importance of avoiding the uncertainties and unfair discrepancies that can plague a judicial effort in evaluating Title VII cases. *Burlington Northern and Santa Fe Railway Co. v. White*, 126 S.Ct. 2405, 2415 (2006).

Parties in the 5th Circuit should be able to get the same justice as parties in the 1st or 10th Districts. The

laws should be applied uniformly. When laws are not applied uniformly we enter a slippery slope that threatens the consistency and preservation of our laws. Interpretation may be a little different, but if the disparity continues, a wider gap occurs and eventually becomes a conflict between the Appellate courts. We also get uncertainties and unfair discrepancies between the various circuits. The decision of the United States Court of Appeals for the Fifth Circuit has created a conflict and an unfair discrepancy with other circuit courts.

The United States Court of Appeals for the 5th Circuit improperly applied the law by attempting to balance the evidence submitted by the parties, crediting testimony by witnesses for the moving party over testimony from the nonmoving party and resolving disputes about what inferences should be drawn from the evidence. Therefore, this Court must grant cert in order to restore uniformity and to dispense with the unfair discrepancy.

Two questions are presented:

1. Did the United States court of appeals for the Fifth Circuit violate Sabzevari's right of a trial by jury as guaranteed by the 7th Amendment of the United States Constitution by violating Rule 56 and Rendering a decision that conflicts with decisions from the Supreme Court and decisions from other Circuit Courts?

2. Is the United States Court of Appeals for the Fifth Circuit's punishment of Sabzevari's mitigation efforts inconsistent with decisions from the Supreme Court by failing to take into account constructive discharge in its analysis?

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is unreported. The unreported opinion is attached in the appendix pages 1a-10a . Petitioner timely filed a request for Panel rehearing that was denied. The denial is included in the appendix at page 37a.

JURISDICTION

Under 28 U.S.C. §1254(1) this Court has jurisdiction to review the decision of the United States Court of Appeals for the Fifth Circuit entered on January 31, 2008. A petition for panel rehearing was denied on February 26, 2008.

RELEVANT PROVISIONS INVOLVED

The applicable statute is Fed.Rev.Civ.Pro. 56 which says that judgment shall be granted only if there is not a "genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. The impacted constitutional right is under Amendment VII which states that "[i]n suits at common law...the right of trial by jury shall be preserved...."

STATEMENT

Sabzevari brought this action for violations of Title VII of the Civil Rights Act of 1964, as amended, 42 USC §2000e, et seq. ("Title VII") alleging that Reliable discriminated against him based on national origin by promoting a less qualified white male to District Manager. Sabzevari further alleges that he was

retaliated against for raising complaints about Reliable's violations of Title VII and was ultimately terminated in violation of Title VII.

On June 15, 2006 the district court entered summary judgment in Reliable's favor holding that (1) Sabzevari's failure to promote claim was time barred. (A-17a); (2) Sabzevari's retaliation claim based on Reliable's failure to transfer him was not an adverse employment action. (A-20a); (3) There is not a causal connection between Sabzevari's termination and/or that Reliable had a legitimate non-retaliatory reason for the termination. (A-22a); (4) Sabzevari failed to exhaust his administrative remedies regarding any alleged constructive discharge claim. (A-25a); and (5) There is no evidence that Reliable acted with malice or reckless indifference to justify punitive damages and/or there being no viable claims left, the issue of punitive damages was moot. (A-25a).

On June 29, 2006, Sabzevari filed a motion to vacate based on the Supreme Court's decision in *Burlington Northern and Santa Fe Railway Co.* that was issued on June 22, 2006. 126 S.Ct 2405 (R. 636). On August 10, 2006, the district court granted in part and denied in part Sabzevari's motion to vacate (A-35a) but ultimately held that Reliable's denial of Sabzevari's transfer was a purely lateral transfer and therefore not a material adverse employment action. (A-32a).

The district judge's final decision was appealed and on January 31, 2008, the United States Court of Appeals for the Fifth Circuit affirmed, holding that (1) Sabzevari failed to raise a genuine issue of material fact to contradict Reliable's proffered evidence of a

legitimate non-discriminatory reason for Dixon's promotion to District Manager (A-6a); (2) Sabzevari presented no evidence that a transfer back to Austin was anything but a purely lateral transfer and therefore not an adverse employment decision. (A-7a); (3) Reliable's manager's verbal testimony was sufficient to establish a company policy that articulated a legitimate, nondiscriminatory reason for requiring Sabzevari to move. (A-9a); and (4) Sabzevari effectively quit by accepting alternate employment. (A-8a).

Facts

In September of 2000, a white male from Reliable's Beaumont office, Mr. Doug Dixon, was promoted to District Manager in Missouri. (R. 457). According to Mr. Grant Pillow, Appellee's Director of Agents and Sr. Vice President, a person is not qualified as a District Manager when they have a history of ethical violations, company rule violations or a lack of recruitment. (R. 501-3).

Starting in 1996, Mr. Dixon had a history of ethical violations, company rule violations and a lack of recruitment. (R. 513, 515 and 533). Sabzevari has had no such reprimands for ethical or company policy violations during his tenure with Reliable. Even when Sabzevari's recruitment was not up to his standard in the 2nd quarter of 2000, he still met the minimum/average requirement for recruitment. (R. 546 and 528-9). Sabzevari's recruitment was corrected the very next quarter. (R. 546). However, when Mr. Dixon was promoted to District Manager in October of 2000, he had already been put on notice that if his recruitment did not improve he would be placed on probation. (R. 535 and 537). Unlike

Mr. Dixon, Sabzevari did not have a history of recruiting problems.

According to Sabzevari's District Manager, the only reason Mr. Dixon was promoted to District Manager was because Reliable had more "white managers" working for them. (R. 457).

Due to the promotion of Mr. Dixon, Sabzevari began to raise issues with regard to company policy on the apparent lack of promotion of foreign race employees of the company. (R. 457). Sabzevari informed his co-workers and supervisors during meetings that he believed some of their actions regarding hiring and promotions to be in violation of Title VII policies and in direct violation of the company handbook. Id. After Sabzevari raised his Title VII complaints, Reliable began retaliating against him. Id. Sabzevari was labeled a troublemaker and other employees were told to stay away from him if they wanted to save their jobs. Id. Sabzevari was ostracized at work causing him a great deal of stress. Id. Mr. Sabzevari's evaluation also took a "suspicious" downward trend. (R. 531).

In October of 2000, Sabzevari became aware that a position was open in Austin. (R. 457). Sabzevari believed that a transfer back to Austin would provide him more job security and would remove him from the hostile environment he was being subjected to in Beaumont. Id. Sabzevari requested to transfer back to Austin as an assistant manager, which was initially approved. Id. However, in the fall of 2000, Reliable instituted an initiative to promote Hispanics and

African Americans over other races[1]. Id. Sabzevari was informed in early November 2000 that his transfer had been rescinded. Id.

When Mr. Sabzevari called to find out why his transfer was withdrawn, he was told by the regional manager, Mr. Mike Wheeler, that he "was a traitor because of [Sabzevari's] complaints about the way Reliable was conduct[ing] its business" and his career was threatened. (R. 458). Later in November of 2000, Sabzevari received a letter from management stating, for the first time, that he was in violation of company policy in that he was required to live within 25 miles of the district office. Id. In fact, other assistant managers were allowed to live over 25 miles from the district office. (Exhibit "A" to Appellant's Motion to Supplement the Record.) Nevertheless, Sabzevari was informed that he must move within 60 days or be immediately demoted to the status of agent. (R. 458). Sabzevari requested that Reliable suspend this action until the end of the school year for the benefit of his children but his request was denied. Id.

Sabzevari's work environment became so hostile and stressful that he sought medical help and was placed on medical leave by a physician. (R. 458).

On February 6, 2001, a letter outlining Sabzevari's complaints was forwarded to Reliable's

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[1] Reliable's discriminatory initiative led to other charges of discrimination and at least one (1) positive finding by the EEOC, which ultimately led to a consent decree signed by Judge Werlien in EEOC v. The Reliable Life Insurance Company, Civil Action No. H-03-01180.

Director of Human Resources. (R. 232). Reliable responded to the letter, completely ignoring Sabzevari's Title VII complaints. (R. 235). The undersigned replied to Reliable and, in an effort to resolve Sabzevari's complaints, reminded Reliable of Sabzevari's Title VII complaints and the need to resolve Reliable's violations so that Sabzevari could return to work. (R. 238).

On March 8, 2001, the undersigned notified Reliable that Sabzevari had been released to return to work and that he was ready, willing and able to return to work provided steps were taken to address Sabzevari's concerns that were detailed in the previous letters. (R. 241). On the same day, March 8, 2001, the undersigned received a letter from Reliable, which denied any knowledge of Sabzevari's complaints. (R. 243). On March 16, 2001, Sabzevari responded to Reliable's latest letter and advised Reliable that he was left with no choice but to file a complaint with the EEOC. (R. 246). On March 22, 2001, Reliable notified Sabzevari that effective March 8, 2001, his employment with Reliable was terminated. (R. 251).

REASONS FOR GRANTING THE PETITION

I. REVIEW IS NECESSARY AS THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT HAS VIOLATED SABZEVARI'S RIGHT OF A TRIAL BY JURY AS GUARANTEED BY THE 7TH AMENDMENT OF THE UNITED STATES CONSTITUTION BY VIOLATING RULE 56 AND RENDERING A DECISION THAT CONFLICTS WITH DECISIONS FROM THE SUPREME COURT AND DECISIONS FROM OTHER APPELLATE COURTS

A. In determining whether to grant Summary Judgment as a matter of law under Fed.R.Civ.P. 56, should a District Judge and/or an Appellate Judge interpret conflicting facts in the light most favorable to the nonmoving party?

Approximately eight years ago, in another case from the United States Court of Appeals for the Fifth Circuit, this Court reiterated the long standing rule that courts "must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence." *Reeves v. Sanderson Plumbing Products, Inc.*, 120 S.Ct. 2097, 2110 (2000). In the Reeves case, the United States Court of Appeals for the Fifth Circuit overtly weighed the evidence and determined that the evidence was insufficient to support the jury's findings. Id. at 2111. In the case at bar, the United States Court of Appeals for the Fifth Circuit covertly weighed the evidence by ignoring the evidence that supported the nonmovant's claims. It does not matter whether the court weighs the evidence overtly or covertly - the

result is the same. Factual disputes are being improperly taken away from juries, which violates the 7th Amendment and conflicts with rulings from other Circuit Courts. See *Schoonejongen v. Curtis-Wright Corp.*, 143 F.3d 120, 143 (3rd Cir. 1998)(When a material fact cannot be resolved without weighing the credibility of a witness, summary judgment is improper.); *Cadle Co. v. Hayes, III,* 116 F.3d 957, 960 (1st Cir. 1997)(Summary judgment is proper only if without regard to credibility determinations, reveals no genuine issue as to any material fact.); *Logan v. Commercial Union Insurance Company*, 96 F.3d 971, 978 (7th Cir. 1996)(Consider all facts in the light most favorable for nonmovant, resolving all inferences in his favor.); *MacDonald v. Delta Air Lines, Inc.*, 94 F.3d 1437, 1440 (10th Cir. 1996)(View all evidence and draw any inferences thereform in the light most favorable to the nonmoving party.); and *Yerdon v. Henry*, 91 F.3d 370, 375 (2nd Cir. 1996)(When genuine factual issues can be resolved in favor of either party, summary judgment is improper.).

In its opinion, the United States Court of Appeals for the Fifth Circuit stated that "Sabzevari has pointed to no company policy or past promotional decision to support the conclusion that these [the Dixon reprimands] should have disqualified Dixon." (A-5a). Later in the opinion the Panel states that it is unnecessary to have a policy in writing for it to be in place. (A-9a).

However, Sabzevari pointed to the testimony of Mr. Grant Pillow, Reliable's Director of Agents and Sr. Vice President, who stated that he would not want a person as a District Manager that had a history of ethical violations, company rule violations or a lack of

recruitment. (R. 501-3). If the Director of Agents and Sr. Vice President for Reliable is not sufficient to testify about qualifications and company policy, then who is? Furthermore, Mr. Pillow did not place a limit on when the ethical and company rule violations and lack of recruitment occurred[2].

B. Under the Civil Right Act of 1964, is a summary judgment proper when a jury could infer from the evidence that a parties Title VII rights were violated?

Applying the law to these facts, could a reasonable jury conclude that based on the testimony from Reliable's director of Agents and Sr. Vice President, a person with a history of ethical violations and company rule violations is automatically disqualified from being a district manager? Especially considering that at the time of the promotion, Mr. Dixon was on the verge of being placed on probation for recruitment violations. If the answer is yes, then this Court must reverse the lower court's decision and remand this case for a trial on its merits.

Contrary to the finding by the United States Court of Appeals for the Fifth Circuit, Sabzevari and Dixon did not have identical scores on recruiting evaluations in the period immediately proceeding Mr. Dixon's promotion. Mr. Dixon had problems with recruiting for ALL of 2000. (R.533). In fact, when Mr. Dixon was promoted to District Manager in October of

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[2] If the violations of Mr. Dixon going back four years were not a disqualifying event, then Reliable should have presented evidence that would support this argument.

2000, he had already been put on notice that if his recruitment did not improve he would be placed on probation. (R. 535 and 537). On the other hand, Sabzevari only had an issue in the 2nd quarter of 2000 and while Sabzevari's recruitment was not up to his standard, he still met the minimum/average requirement for recruitment. (R. 546 and 528-9). According to Mr. Pillow, Mr. Sabzevari was more qualified for the District Managers position since he did not have a history of recruiting problems like Mr. Dixon.

To find that Mr. Dixon and Mr. Sabzevari had the same evaluations immediately proceeding the promotion overlooks the evidence that, according to Mr. Mike Wheeler, the regional manager over Sabzevari's district, Sabzevari's decrease in ratings was suspicious and should have been investigated. (R. 531). In fact, the suspicious decrease in Mr. Sabzevari's evaluations occurred in the period of time that he was complaining about Reliable's improper employment practices and that Mr. Dixon was offered the promotion to District Manager. The reasonable inference is that there is a relationship between the decrease in ratings and Mr. Sabzevari's complaints.

Further justification for a jury to reasonably infer that Reliable's promotion decision was discriminatory comes from Sabzevari's District Manager, who confirmed that the only reason Mr. Dixon was promoted to District Manager was because Reliable had more "white managers" working for them. (R. 457).

An employee can prove a failure to promote claim by either the direct method, that racial discrimination motivated the employment decision, or

by the indirect burden-shifting method. *Nichols v. Southern Illinois University-Edwardsville*, 510 F.3d 772, 783 (7th Cir. 2007). Under the burden-shifting method, an employee can "prove pretext by showing that [he] was better qualified or by amassing circumstantial evidence that otherwise undermines the credibility of the employer's stated reason." *Hux v. City of Newport News, Virginia*, 451 F.3d 311, 315 (4th Cir. 2006) quoting *Heiko v. Colombo Savings Bank, F.S.B.*, 434 F.3d 249, 259 (4th Cir. 2006). The first test requires a comparison of the candidates. The second test does not necessarily require a comparison of the candidates. For instance, if a position required a four-year degree, and the person who received the position, over a degreed minority, did not have a degree, is there any need to compare qualifications beyond the degree qualifications? The current case is no different. The Vice President in charge of agents testified that he would not want a District Manager who had; i) ethical violations; ii) company rule violations; or iii) a history of recruitment problems. Mr. Dixon had all three and Sabzevari had none.

The foregoing facts show that there is sufficient evidence that a jury could infer that Reliable violated Title VII by promoting Mr. Dixon over Sabzevari.

C. Under Burlington Northern, did the Supreme Court determine that whether an act is an adverse employment action is an objective standard that depends on the particular facts of the case and therefore, should be left up to the trier of fact to determine if the employment action was adverse?

In Burlington, the Supreme Court held that whether a particular act is an adverse employment action depends on the circumstance. *Burlington Northern*, 126 S.Ct. @ 2415. The Supreme Court emphasized the importance of a "reasonable employee standard" in order to avoid "the uncertainties and unfair discrepancies that can plague a judicial effort to determine a plaintiff's unusual subjective feelings." Id.

In the current case, a reasonable jury could infer that Sabzevari suffered an adverse employment action when Reliable approved and then withdrew Sabzevari's transfer request. Sabzevari requested a transfer back to Austin because he believed that the transfer would provide him more job security and would remove him from the hostile environment he was being subjected to in Beaumont. (R. 457). After Sabzevari raised his Title VII complaints, Sabzevari was labeled a troublemaker and other employees were told to stay away from him if they wanted to save their jobs. (R. 457). Mr. Sabzevari's evaluation also took a "suspicious" downward trend. Furthermore, after the transfer approval was withdrawn, Sabzevari was told by Mr. Wheeler that he "was a traitor because of [Sabzevari's] complaints about the way Reliable was conduct[ing] its business" and Mr. Wheeler threatened Sabzevari's career. (R. 458). Then, for the first time, Sabzevari was told to move within the district or be demoted. Id.

The reasonable inference is that Sabzevari's belief that Austin would provide him more job security and remove him from the hostile environment turned out to be true. Mr. Sabzevari was told his transfer was denied because he was a traitor. Mr. Sabzevari was then forced to choose between a demotion at work or uprooting his family.

The Supreme Court found that Title VII's anti-retaliation provisions protect employees from retaliation that produces an injury or harm. *Burlington Northern*, 126 S.Ct @ 2114. What can be more harmful than being forced to choose between a demotion or uprooting your family. Reliable retaliated against Sabzevari by creating a hostile environment, withdrawing his transfer and ordering him to move, all of which would discourage a reasonable worker from making or supporting a charge of discrimination. *Burlington Northern*, 126 S.Ct at 2415. Whether the foregoing evidence establishes an adverse employment action under the circumstances of the case at bar should have been left to the trier of fact. Id. @ 2415.

D. Under the Civil Rights Act of 1964, is it sufficient for a party to deny that an oral statement was made in order to defeat a summary judgment?

Once a party has moved for summary judgment by submitting evidence on a material fact, in order to create a genuine issue the nonmovant must submit contrary evidence in the form of affidavits, deposition testimony, or other admissible documents. Fed.R.Civ.Pro. Rule 56 and see *Adickes v. S.H. Kress & Co.*, 90 S.Ct. 1598, 1610 (1970).

In the current case, one of the adverse employment actions alleged by Sabzevari is that after complaining about potential violations of Title VII, he was ordered to move within the district or face a demotion. The United States Court of Appeals for the Fifth Circuit dismissed this as an adverse employment action based on the premise that it was a long standing rule for "district managers to live within their districts." (A-8a thru 9a). First, Mr. Sabzevari was NOT a district manager but an assistant manager. Second, there was no written policy[3] regarding district or assistant managers living within the district. Third, other assistant managers were allowed to live outside their district and not face demotion. (Exhibit "A" to Appellant's Motion to Supplement the Record.). Finally, there is a dispute about whether Sabzevari was ever informed about the purported policy BEFORE his Title complaints.

Without any written documentation, Reliable is relying on testimony to establish the policy and the fact that Sabzevari was informed that he needed to live within the district before he complained about Reliable's Title VII violations. However, Sabzevari submitted an affidavit denying that he was ever told about the company's alleged policy regarding Assistant Managers living within their district. Therefore, Sabzevari is entitled to the benefit of the doubt on his claim that the first time this policy was raised was after Sabzevari started complaining about Reliable's discriminatory practices. *Adickes*, 90 S.Ct. @ 1608; *Bailey v. Floyd County Bd. of Educ.*, 106 F.3d 135, 145 (6th Cir. 1997) and *Colon v. Coughlin*, 58 F.3d 865, 872

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[3] The policy was "proven" by the oral testimony of Reliable's witnesses.

(2nd Cir. 1995). Contrary to Reliable's claims, Mr. Hirschfeld, Sabzevari's previous regional manager and the one that requested he transfer to Beaumont, never mentioned anything about Sabzevari having to move to Beaumont. (R. 458). Mr. Hirschfeld did comment, however, that it would be nice for Sabzevari and his wife to be able to live in their League City home while Sabzevari was working in Beaumont. (R. 475).

Without any supporting documentation to support Reliable's position, the United States Court of Appeals for the Fifth Circuit is taking as true the testimony of Reliable's witnesses over Sabzevari's denial. A reasonable jury could believe Sabzevari, especially considering other Assistant Managers were permitted to live outside their district. Furthermore, lets not forget that Reliable requested for Sabzevari to transfer to Beaumont. (R. 456). Part of the benefit for Sabzevari to transfer to Beaumont was that Sabzevari and his family would be able to live in their League City home. (R. 475).

The United States Court of Appeals for the Fifth Circuit also overlooked and/or misapprehended that prior to Sabzevari's complaints about Reliable's improper employment practices, there was never any mention to Sabzevari that he was required to "live within the district boundaries and no more than approximately 25 miles from the district office." (R. 228 & 229). Whether Reliable retaliated against Sabzevari by demanding that he live within the district when other assistant managers were not required to live within the district, is a fact question that should be left to the trier of fact.

II. REVIEW IS WARRANTED SINCE THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT'S PUNISHMENT OF SABZEVARI'S MITIGATION EFFORTS IS INCONSISTENT WITH DECISIONS FROM THE SUPREME COURT BY FAILING TO TAKE INTO ACCOUNT CONSTRUCTIVE DISCHARGE IN ITS ANALYSIS.

A. Under Title VII, when an employee mitigates their damages by accepting another position, does that preclude a wrongful termination as a matter of law?

On March 8, 2001, Sabzevari was released to return to work. He made it clear to Reliable that he was ready willing and able to return to work provided his Title VII complaints were addressed. (R. 232). Since Reliable completely ignored his complaints, in an effort to mitigate his damages Sabzevari began alternate employment after he was released to return to work. On March 22, 2001, Reliable terminated his employment.

The United States Court of Appeals for the Fifth Circuit agreed with Reliable that Sabzevari "effectively quit" when he accepted alternate employment. (A-8a). However, Texas is an employment-at-will state. *Midland Jud. Dist. Comm. Supervision & Corrs. Dept. v. Jones*, 92 S.W.3d 486, 487 (Tex. 2002). In the case at bar, there is no evidence that Sabzevari was precluded from returning to Reliable if it had addressed his concerns that were detailed in his February 2001 letter. (R. 232). Sabzevari has a duty to mitigate his damages under Title VII. Sabzevari mitigated his damages by

locating alternative employment that began after he was released to return to work. By finding that Sabzevari effectively quit because he accepted alternate employment ignores the fact that all the documentation establishes that Mr. Sabzevari, as of March 8, 2001, was ready, willing and able to return to work for Reliable, if Reliable addressed his concerns. (R. 241).

The United States Court of Appeals for the Fifth Circuit sets up a very problematic standard. Taking the court's holding to its logical conclusion, if a person "effectively quits" there can't be a wrongful discharge claim even if the employee was constructively discharged. The holding contradicts the constructive discharge doctrine, which has been "solidly established" in the federal courts when Title VII was enacted in 1964. *Pennsylvnia State Police v. Suders*, 124 S.Ct. 2342, 2351 (2004).

B. If it is determined that an employee "effectively quit," must the court still consider whether the employee was constructively discharged?

Constructive discharge occurs when an employer creates such a hostile environment that no reasonable person would continue working in such conditions. *Pennsylvnia State Police*, 124 S.Ct. @ 2351. In the case at bar, after raising his Title VII complaints, Reliable retaliated against Sabzevari by: (i) labeling him a troublemaker; (ii) telling other employees to stay away from him if they wanted to save their jobs; (iii) an evaluation taking a "suspicious" downward trend; (iv) withdrawing a transfer because Sabzevari was a "traitor" due to his Title VII complaints; (v) threatening his career; and (vi) telling Sabzevari for the

first time to move within the district or be demoted. The environment became so hostile that it impacted Sabzevari's health and his doctor placed him on medical leave. The foregoing facts can and do establish a working environment so hostile that no reasonable person would keep working for Reliable. See *Williams v. Waste Management of Illinois*, 361 F.3d 1021, 1032 (7th Cir. 2004)(Facts proving constructive discharge can consist of "subjecting an employee to a humiliating, degrading, unsafe, unhealthful or otherwise significantly negative workplace environment not present before the complaint.").

When Reliable was notified of Sabzevari's complaints in writing, the complaints were completely ignored and later, Reliable denied ever knowing about the Title VII complaints. Based on the foregoing, a reasonable jury could infer that no reasonable person would continue working in such conditions. The uncontroverted facts in the current case are that Sabzevari was terminated for not returning to work, and Sabzevari was ready willing and able to return to work provided Reliable addressed his Title VII complaints. To the extent that a trier of fact could infer that Sabzevari quit, then you must consider whether it was a constructive discharge. However, the United States Court of Appeals for the Fifth Circuit stopped its determination once it found that Sabzevari quit based on his acceptance of another position.

In the current case, if Sabzevari "effectively quit" by accepting alternate employment instead of being fired[4] the court must address whether a

[4] If Sabzevari was fired, the burden shifting rules would apply and

constructive discharge case would support Sabzevari's wrongful termination claim. *Pennsylvnia State Police*, 124 S.Ct. @ 2351.

According to Justice Sandra Day O'Connor, our laws are "threatened when judges ignore settled law and make decisions according to personal or public preferences." Justice Sandra Day O'Connor, "How to Save our Courts", Parade, February 24, 2008. When a court improperly applies the law, the decision should be reviewed and, if it is incorrect, the decision should be overturned. Id.

CONCLUSION

In light of this Court's decision in *Reeves v. Sanderson Plumbing* and *Pennsylvnia State Police*, and for all the foregoing reasons, petitioner respectfully requests that the Supreme Court grant certiorari, vacate the decision of the United States Court for the Fifth Circuit, remand this matter to the District Court for a trial on the merits and for such other and further relief that petitioner may be entitled.

Respectfully submitted,
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he would have to prove that Reliable's proffered reason was merely pre-textual. If Sabzevari quit, then the court would have to apply the constructive discharge analysis.

(footnotes trail end of each document)

No. 06-20888

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

MEHRDAD SABZEVARI,
Plaintiff-Appellant

v.

THE RELIABLE LIFE INSURANCE COMPANY,
Defendant-Appellee

January 31, 2008, Filed

NOTICE: PLEASE REFER TO FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1 GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

COUNSEL: For MEHRDAD SABZEVARI, Plaintiff - Appellant: Stephen Joseph Schechter, Seabrook, TX.

For RELIABLE LIFE INSURANCE CO, Defendant - Appellee: G Mark Jodon, Allan Huddleston Neighbors, Littler Mendelson, Houston, TX.

JUDGES: Before JONES, Chief Judge, and WIENER and CLEMENT, Circuit Judges.

OPINION

PER CURIAM: *

Mehrdad Sabzevari ("Sabzevari") appeals the district court's grant of summary judgment dismissing his Title VII claims against The Reliable Insurance Company ("Reliable"). We AFFIRM.

I. BACKGROUND

Sabzevari worked for Reliable as an assistant manager in the Beaumont district office. In September 2000, Reliable promoted Doug Dixon, a white assistant manager in the Beaumont office, to district manager of the Sikeston, Missouri office. At the meeting announcing Dixon's promotion, Sabzevari declared that he was denied the promotion because of his Iranian national origin. Sabzevari also informed his co-workers and supervisors that he believed the company's failure to promote "foreign race" employees violated Title VII. Sabzevari alleges that after he questioned Reliable's promotion practices, his work environment became so hostile that his doctor placed him on medical leave.

While on medical leave, Sabzevari applied for employment with American National Insurance Company ("American National"). On March 8, 2001, Sabzevari's doctor released him to return to work without restriction. According to Sabzevari, he did not return to work at that time because Reliable still had not addressed his Title VII concerns. On March 15, 2001, Sabzevari filed a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC"), alleging national origin discrimination and retaliation.

On March 19, 2001, Sabzevari accepted employment with American National. Three days later, Reliable

sent Sabzevari a letter terminating his employment because he had failed to return to work after obtaining a medical release. In August 2002, Sabzevari amended his 2001 EEOC charge to add the claim that Reliable failed to promote him because of his national origin.

Sabzevari filed this lawsuit in August 2003, claiming that Reliable violated Title VII by failing to promote him because of his national origin and by retaliating against him after he expressed opposition to the company's employment practices. He also asserted that he was entitled to punitive damages as a result of these violations. Reliable moved for summary judgment on all of Sabzevari's claims, and the district court granted the motion.

II. STANDARD OF REVIEW

This court reviews a grant of summary judgement *de novo*, applying the same legal standard as the district court. *Chacko v. Sabre, Inc.*, 473 F.3d 604, 609 (5th Cir. 2006). Summary judgment is appropriate when the evidence demonstrates that "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c).

III. DISCUSSION

Sabzevari argues that the district court erred in granting summary judgment on his failure-to-promote claim, his retaliation claim, and his claim for punitive damages.

Sabzevari first asserts that Reliable discriminated

against him by denying him the promotion that it awarded to Doug Dixon. In granting summary judgment on this claim, the district court reasoned that Sabzevari did not amend his charge to include the failure-to-promote allegation until August 2002. Accordingly, the district court concluded that the allegation was not timely filed with the EEOC, and that Sabzevari had not exhausted his administrative remedies for the failure-to-promote claim. On appeal, Sabzevari argues that the original charge he filed with the EEOC was sufficient to exhaust his administrative remedies.

We need not decide this issue. Even if we assume that Sabzevari has exhausted his administrative remedies, summary judgment on the failure-topromote claim is proper because Reliable has articulated a legitimate, nondiscriminatory reason for promoting Dixon, and Sabzevari has failed to raise a genuine issue of material fact as to whether this reason is a pretext for discrimination.

To survive summary judgment, a plaintiff must satisfy the burden-shifting test found in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973). *See Septimus v. Univ. of Houston*, 399 F.3d 601, 609 (5th Cir. 2005) (citing *McDonnell Douglas*). Under this test, a plaintiff must first establish a prima facie case of discrimination. *Id.* The burden then shifts to the defendant to set forth a legitimate, nondiscriminatory eason for its decision. *Id.* "The defendant's burden during this second step is satisfied by producing evidence, which, '*taken as true*, would *permit* the conclusion that there was a nondiscriminatory reason for the adverse action.'" *Price*

v. Fed. Express Corp., 283 F.3d 715, 720 (5th Cir. 2002) (quoting *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 509, 113 S. Ct. 2742, 125 L. Ed. 2d 407 (1993)). Selection of a more qualified applicant is a legitimate and nondiscriminatory reason for preferring one candidate over another. *See Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 251-253, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981). If the defendant produces a legitimate reason, any presumption of discrimination raised by the plaintiff's prima facie case vanishes. *Septimus*, 399 F.3d at 609. However, the plaintiff may still avoid summary judgment by demonstrating a genuine issue of material fact as to whether the legitimate reasons proffered by the defendant are a pretext for discrimination. *Id.*

Reliable articulated a legitimate, nondiscriminatory reason for promoting Dixon to the district manager position: selection of the most qualified candidate. Thus, the burden shifts to Sabzevari to show pretext. Sabzevari attempts to do so in two ways. First, he argues that Dixon was not qualified for the promotion because Dixon received two reprimands: one more than two years before the promotion for not submitting a specific application to the home office, and one nearly five years before the promotion for an unspecified infraction of the company's underwriting rules. However, Sabzevari has pointed to no company policy or past promotional decision to support the conclusion that these reprimands should have disqualified Dixon.

Second, Sabzevari attempts to establish pretext by arguing that he was more qualified for promotion than Dixon. For Sabzevari to establish pretext in this way, he must raise a fact issue as to whether he was "clearly

better qualified" and not merely "similarly qualified." *Odom v. Frank*, 3 F.3d 839, 847 (5th Cir. 1993). Sabzevari argues that he is clearly better qualified because Dixon had problems recruiting other employees. However, the summary judgment evidence demonstrates that Dixon and Sabzevari earned identical scores on recruiting evaluations in the period immediately preceding the promotion. Moreover, recruiting is only one criterion among many that Reliable considers when promoting district manager candidates. Even if Sabzevari established that he had superior recruiting skills, this would not raise an issue as to whether he was "clearly better qualified" on the whole. Because Reliable articulated a legitimate, nondiscriminatory reason for promoting Dixon, and Sabzevari has failed to raise a genuine issue of material fact as to whether this reason was pretextual, this claim need not be tried.

Sabzevari also argues that Reliable retaliated against him, after he reported his concerns that the company's employment practices violated Title VII, by: (1) denying him a transfer to the Austin office, (2) terminating him, and (3) creating a hostile work environment.

A prima facie claim of retaliation has three elements: (1) the employee engaged in a protected activity, (2) the employer took adverse action against the employee, and (3) a causal connection exists between the protected activity and the adverse employment action. *See Hockman v. Westward Commc'ns, LLC*, 407 F.3d 317, 330, 122 Fed. Appx. 734 (5th Cir. 2004). An adverse employment action is one that a reasonable employee would find to be "materially adverse," *i.e.*, one that

might "dissuade a reasonable worker from making or supporting a charge of discrimination" under Title VII. *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 126 S. Ct. 2405, 2415, 165 L. Ed. 2d 345 (2006) (internal quotations omitted).

First, Sabzevari argues that Reliable retaliated by denying him a transfer from the assistant manager position in Beaumont to the assistant manager position in Austin. Reliable counters that denial of a lateral transfer, such as the one Sabzevari sought, cannot constitute an adverse employment action. The Supreme Court recently adopted the "materially adverse" standard for determining whether an action constitutes an adverse employment action. *See id.* Under the "materially adverse" standard, "a transfer that does not involve a demotion in form or substance cannot rise to the level of a materially adverse employment action." *Brown v. Brody*, 339 U.S. App. D.C. 233, 199 F.3d 446, 455-56 (D.C. Cir. 1999) (quoting *Ledergerber v. Stangler*, 122 F.3d 1142, 1144 (8th Cir. 1997)); *see also Johnson v. Cambridge Indus., Inc.*, 325 F.3d 892, 900 (7th Cir. 2003). Sabzevari presented no evidence that a transfer from the assistant manager position in Beaumont to the assistant manager position in Austin was anything but a lateral transfer in terms of pay, promotional opportunities, working conditions, and other objective factors. Therefore, denial of the lateral transfer from Beaumont to Austin is not a materially adverse employment action, and cannot support Sabzevari's retaliation claim.

Second, Sabzevari argues that Reliable retaliated against him by terminating his employment. Reliable

disagrees that it terminated Sabzevari, arguing that Sabzevari "effectively quit" when he accepted employment with American National. We agree. Sabzevari failed to return to work after he received his medical release. In addition, he accepted employment with American National before Reliable terminated him. In light of this evidence, Sabzevari has failed to show that Reliable would not have terminated him "but for" his opposition to the company's employment practices.

Third, Sabzevari contends that Reliable retaliated against him by creating a hostile work environment. Specifically, Sabzevari alleges that Reliable demanded that he move within the twenty-five miles of the Beaumont district office. Reliable argues that the company had a longstanding rule that required all district managers to live within their districts and asserts that it would have invoked this rule even if Sabzevari had not engaged in protected activity. Reliable offered evidence that such a rule was in place long before Sabzevari began to work for the company in Beaumont, and that the rule applied to all district managers. The company also submitted evidence that all other managers in the Beaumont district lived within its boundaries, and that it had asked Sabzevari to move within the Beaumont district on multiple occasions before he ever voiced Title VII concerns.

Sabzevari counters that Reliable created this rule to harass him and that it applied the rule only to him. To support this claim, he offered evidence that the rule was not a part of any written policy. Sabzevari also argues that Reliable cannot cite any documentation to support the contention that its managers instructed

him to move before he raised Title VII concerns. However, the fact that the policy was unwritten does not refute the testimony of Reliable's managers that such a policy was actually in place. Furthermore, the fact that Reliable cannot produce documentation that it instructed Sabzevari to move before his complaints does not defeat the testimony of multiple Reliable employees that the company indeed issued such instructions. Accordingly, Reliable has articulated a legitimate, nondiscriminatory reason for requiring Sabzevari to move, and Sabzevari has not raised a genuine issue of material fact as to whether this reason was a pretext for retaliation.

Sabzevari also alleges that Reliable created a hostile work environment by labeling him a troublemaker and a traitor and by ostracizing him. But Sabzevari fails to substantiate these claims with any evidence. Such conclusory assertions are not sufficient to stave off summary judgment. *See Douglass v. United Servs. Auto Ass'n*, 65 F.3d 452, 459 (5th Cir. 1995). For these reasons, we affirm the district court's grant of summary judgment on Sabzevari's retaliation claims.

Finally, Sabzevari contends that the district court improperly dismissed his claim for punitive damages. Because we affirm the dismissal of Sabzevari's Title VII claims, his argument that he is entitled to punitive damages as a result of these claims also must fail.

IV. CONCLUSION

For these reasons, we AFFIRM the district court's grant of summary judgment in favor of Reliable.

Footnotes

*Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

CIVIL ACTION H-03-3240

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION

MEHRDAD SABZEVARI, Plaintiff, vs. THE RELIABLE LIFE INSURANCE CO., Defendant.

June 15, 2006, Decided
June 15, 2006, Filed

COUNSEL: For Mehrdad Sabzevari, Plaintiff: Stephen J Schechter, Attorney at Law, Seabrook, TX.

For The Reliable Life Insurance Company, Defendant: G Mark Jodon, Littler Mendelson, Houston, TX; Allan Huddleston Neighbors, IV, Littler Mendelson PC, Houston, TX.

JUDGES: Gray H. Miller, United States District Judge.

OPINION BY: Gray H. Miller

OPINION

OPINION ON SUMMARY JUDGMENT

In this Title VII suit, plaintiff Mehrdad "Mike" Sabzevari contends The Reliable Life Insurance Company (Reliable), his former employer, discriminated against him due to his Iranian national origin. He alleges Reliable failed to promote him from assistant to district manager, and retaliated against

him for engaging in activity protected under Title VII of the Civil Rights Act of 1964. Reliable seeks summary judgment on all claims (Dkt. 28). For the reasons that follow, Reliable's motion is granted.

Background

Sabzevari began his employment with Reliable in 1993, as an insurance agent. In August 1996 Sabzevari was promoted to assistant manager. In August 1999, he transferred at the request of the company from Austin to Beaumont. Sabzevari claims that in January 2000, he expressed his interest in promotion and advancement to his manager. He was concerned openings were available that he was not being informed about nor given the opportunity to apply for. In September 2000, Reliable promoted Doug Dixon, another assistant manager in the Beaumont office, to district manager in its Sikeston, Missouri office. Dixon is a white male. Sabzevari maintains this position was filled without his knowledge and he was not given an opportunity to apply.

The plaintiff states that in August and September 2000, he informed his co-workers and supervisors of his belief that the company's failure to promote "foreign race" employees violated Title VII and the company's handbook. At the September 2000 district office meeting announcing the Dixon promotion, Sabzevari protested that he was not promoted because of his race. Sabzevari asserts this questioning of Reliable's "practices regarding promotion and insurance agent hiring criteria" led to retaliation from Reliable.[1] First, Sabzevari claims that his transfer request back to Austin in October 2000 was denied, even though a

similar prior request in June had been approved. (Sabzevari at first accepted the June transfer but then declined for financial reasons.)

Second, in November 2000, Reliable told Sabzevari that he was required to live within twenty-five miles of its Beaumont office and that he had sixty days to relocate. Sabzevari asked the relocation be put off until the end of school year so as not to disrupt the education of his children. Sabzevari further states that his work environment became so hostile at this point that he was placed on medical leave by his treating physician, Dr. Vijesh Patel, in January 2001. On March 8, 2001, Dr. Patel released Sabzevari to return to work without restriction.

Sabzevari did not return to work at this time, because he sought certain conditions -- that his Title VII concerns be addressed by the company and that he be transferred to Austin.[2] On March 22, 2001, Reliable sent a letter terminating the plaintiff's employment "as of March 8, 2001" for not returning to work after being released by his doctor.[3] Reliable, however, contends Sabzevari actually quit his job before receiving this letter by taking employment with American National Insurance Company. While Sabzevari was on medical leave, he applied for employment with American National on January 9, 2001. On March 19, 2001, three days before the termination letter was sent, Sabzevari signed an employment agreement with American National. The March 30th American National payroll records indicate he had been on their payroll for the prior two weeks.[4]

Sabzevari filed a charge of discrimination with the Equal Employment Opportunity Commission on March

15, 2001, and an amended charge of discrimination on August 29, 2002. The 2001 charge alleged national origin discrimination and retaliation for Reliable's refusal to transfer Sabzevari to Austin and its insistence he relocate to within twenty-five miles of the Beaumont district office.[5] The August 25, 2002 charge added the claim that Reliable failed to promote Sabzevari because of his national origin.[6]

Legal Standards

Reliable seeks summary judgment on all of Sabzevari's claims. Summary judgment is appropriate if no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. *See* FED. R. CIV. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). The party moving for summary judgment must demonstrate that there are no genuine issues of material fact. *Warfield v. Byron*, 436 F.3d 551, 557 (5th Cir. 2006). An issue is "genuine" if the evidence is such that a reasonable jury could return a verdict for the non-moving party. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986); *Cooper Tire & Rubber Co. v. Farese*, 423 F.3d 446, 454 (5th Cir. 2005). An issue is "material" if its resolution could affect the outcome of the action. *Anderson*, 477 U.S. at 248.

In responding to a properly supported summary judgment motion, the non-movant cannot merely rely on its pleadings, but must present specific and supported material facts, of significant probative value, to preclude summary judgment. *See Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574,

586 n.11, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986); *Guillory v. PPG Indus., Inc.*, 434 F.3d 303, 309 (5th Cir. 2005). In determining whether a genuine issue of material fact exists, the court views the evidence and draws inferences in the light most favorable to the non-moving party. *See Anderson*, 477 U.S. at 255; *Richardson v. Monitronics Int'l, Inc.*, 434 F.3d 327, 332 (5th Cir. 2005).

Analysis

Reliable's grounds for summary judgment on the failure to promote claim are: (1) this allegation was not timely filed with the EEOC and Sabzevari therefore did not exhaust his administrative remedies; (2) Sabzevari cannot establish a prima facie case because he did not actually apply for the district manager position; (3) Reliable has a legitimate, non-discriminatory explanation in that Dixon was more qualified for the district manager position than Sabzevari; (4) Reliable is entitled to the favorable "same actor" inference because the same person who hired and promoted Sabzevari to assistant manager made the decision about Dixon's promotion to district manager. Reliable maintains that it is entitled to judgment as a matter of law on Sabzevari's retaliation claim because he did not suffer an adverse employment action.

1. Failure to Promote

Sabzevari alleges Reliable failed to promote him in September or October 2000 due to discriminatory and retaliatory animus. He amended his EEOC charge to include this act in August 2002, more than 300 hundred

days later. It is therefore time barred, and the court cannot consider it.

A plaintiff must exhaust his administrative remedies by a filing a charge of discrimination with the EEOC prior to seeking judicial relief. *Dollis v. Rubin*, 77 F.3d 777, 781 (5th Cir. 1995).[7] Under Title VII, a plaintiff "shall" file an employment discrimination charge with the EEOC either 180 or 300 days after an "alleged unlawful employment practice occurred." *See* 42 U.S.C. § 2000e-5(e)(1); *see also National R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 109-10, 122 S. Ct. 2061, 153 L. Ed. 2d 106 (2002).[8] A claim is time barred if not filed within these time limits. *National R.R.*, 536 U.S. at 109. Generally the limitations period begins on the date that the discriminatory act occurred, and a plaintiff cannot sustain his claims based on incidents occurring before the 300 day period. *See National R.R.*, 536 U.S. at 113; *Waltman v. International Paper Co.*, 875 F.2d 468, 474 (5th Cir. 1989). Despite not being a jurisdictional prerequisite to filing suit, this is a statutory precondition to maintenance of any action under Title VII. 42 U.S.C. § 2000e-5(e); *National R.R.*, 536 U.S. at 113.

Sabzevari argues that Reliable should be equitably estopped from asserting the time-bar because it knew about his claim of failure to promote and addressed it in its position statement to the EEOC. The timeliness requirement is in fact subject to equitable exceptions. *See Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 398, 102 S. Ct. 1127, 71 L. Ed. 2d 234 (1982). Under the equitable estoppel doctrine invoked by Sabzevari, an employer is estopped from relying on the filing periods if the employer misrepresented or concealed facts

necessary to support a discrimination charge and thereby caused the plaintiff not to assert his rights within the limitations period. *See Rhodes v. Guiberson Oil Tools Div.*, 927 F.2d 876, 878-79 (5th Cir. 1991), *cert. denied*, 502 U.S. 868, 112 S. Ct. 198, 116 L. Ed. 2d 158 (1991). The plaintiff has the burden of proving this form of estoppel. *Id.* at 879.

Here there is no allegation Reliable concealed facts or misled Sabzevari causing him not to timely file his claim of failure to promote. As evidenced by his protestations at the district office meeting, Sabzevari was immediately aware that he had not been promoted. Nor has Sabzevari offered any other persuasive reason why the filing deadline should be equitably extended in this case. The Supreme Court has instructed that equitable doctrines are to be "applied sparingly" when altering the time period for filing an employment discrimination charge. *National R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 113 (2002). With this in mind, the court finds that Sabzevari has not carried his burden of demonstrating that an equitable waiver of the time requirement is applicable.[9]

Sabzevari's untimely filing precludes his claim of failure to promote, and Reliable is entitled to judgment as a matter of law on this cause of action.

2. Retaliation

Turning next to Sabzevari's cause of action for retaliation, Title VII provides that "[i]t shall be an unlawful employment practice for an employer to discriminate against any of his employees ... because he has opposed any practice made an unlawful

employment practice by this subchapter, or because he had made a charge ... under this subchapter." 42 U.S.C. § 2000e-3(a). A retaliation claim has three elements: (1) the employee engaged in activity protected by Title VII; (2) the employer took adverse action against the employee; and (3) a causal connection exists between the protected activity and the adverse employment action. *Hockman v. Westward Commc'ns LLC*, 407 F.3d 317, 330, 122 Fed. Appx. 734 (5th Cir. 2004); *Walker v. Thompson*, 214 F.3d 615, 628-29 (5th Cir. 2000). An employee has engaged in activity protected by Title VII if he has either (1) "opposed any practice made an unlawful employment practice" by Title VII, or (2) "made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing" under Title VII. 42 U.S.C. § 2000e-3(a); *Grimes v. Texas Dep't of Mental Health & Mental Retardation*, 102 F.3d 137, 140 (5th Cir. 1996).

Sabzevari complains Reliable retaliated against him with respect to two discrete employment actions: (i) the denial of the Austin transfer, and (ii) the termination of his employment.[10]

(i) Denial of Transfer

Reliable does not contest that Sabzevari satisfies the first element of retaliation. Under Title VII's "opposition clause," an employee meets this threshold if he has a reasonable belief that his employer engaged in unlawful employment practices. *See Long v. Eastfield Coll.*, 88 F.3d 300, 305 (5th Cir. 1996).

Reliable does dispute that Sabzevari has established the second and third elements of retaliation, denying

that it took an adverse employment action against Sabzevari, or that there was any causal connection between the purported adverse actions and his raising concerns about Reliable's promotion practices.

An employment decision is only adverse where it is an "ultimate employment decision." *Mattern v. Eastman Kodak Co.*, 104 F.3d 702, 707-08 (5th Cir. 1997), *cert. denied*, 522 U.S. 932, 118 S. Ct. 336, 139 L. Ed. 2d 260 (1997). The denial of the transfer request to Austin was clearly not an ultimate employment decision under Fifth Circuit precedent. *See, e.g., Burger v. Central Apartment Mgmt., Inc.*, 168 F.3d 875, 879 (5th Cir. 1999) ("[r]efusing an employee's request for a purely lateral transfer does not qualify as an ultimate employment decision"); *see also Wakefield v. State Farm Ins.*, 229 F.3d 1148 (5th Cir. 2000) (unpublished table decision) (an opportunity to be reviewed for a promotion or a lateral move are not ultimate employment decisions); *see generally Hernandez v. Crawford Bldg. Material Co.*, 321 F.3d 528, 532 n.2 (5th Cir. 2003) (per curiam) (cataloguing the Fifth Circuit's taxonomy of "ultimate employment decisions"). Nearly every other circuit has likewise held that a lateral transfer does not amount to an adverse employment decision,[11] with this explanation coming from the Seventh Circuit:

> Obviously a *purely* lateral transfer, that is, a transfer that does not involve a demotion in form or substance, cannot rise to the level of a materially adverse employment action. A transfer involving no reduction in pay and no more than a minor change in working conditions will not do, either. Otherwise every trivial

> personnel action that an irritable, chip-on-the-shoulder employee did not like would form the basis of a discrimination suit.

Williams v. Bristol-Myers Squibb Co., 85 F.3d 270, 274 (7th Cir. 1996) (emphasis in original) (citations omitted).

Sabzevari argues the Austin transfer would not have been a purely lateral transfer because it would have "provide[d] him a more secure future and one free of harassment."[12] This is unpersuasive for several reasons. First, no summary judgment evidence is provided in support of this assertion. *Cf. Wakefield*, 229 F.3d 1148. Second, employment actions are adverse only where pay, benefits or level of responsibility are affected. *See Pegram v. Honeywell, Inc.*, 361 F.3d 272, 282 (5th Cir. 2004); *Banks v. East Baton Rouge Parish Sch. Bd.*, 320 F.3d 570, 575 (5th Cir. 2003), *cert. denied*, 540 U.S. 817, 124 S. Ct. 82, 157 L. Ed. 2d 34 (2003). Sabzevari was seeking transfer from an assistant manager position in Beaumont to an assistant manager position in Austin. He has offered no proof that this transfer would have resulted in different pay, benefits, or level of responsibility. Third, presumably most employees who seek a transfer do so because they believe it will help secure their future or place them in a better work environment. But this subjective expectation by itself does not affect whether a transfer is "lateral" or not.

(ii) Termination

Turning next to the purported retaliatory termination, there are several difficulties with this claim. First, the summary judgment evidence suggests that Sabzevari terminated the employment relationship before

Reliable did. While Sabzevari's termination was effective March 8, 2001, Reliable's decision was announced on March 22, 2001. As of that date, Sabzevari had effectively resigned from Reliable by taking a position with another company (as of at least March 19, 2001).

Assuming *arguendo* that the employment relationship still existed as of March 22, 2001, Sabzevari has not produced evidence of a causal nexus between his protests and the termination. The standard for proving causal nexus in retaliation cases is "causation-in-fact" or "but-for" causation. *See Scrivner v. Socorro Indep. Sch. Dist.*, 169 F.3d 969, 972 (5th Cir. 1999) ("[t]o carry [his] ultimate Title VII burden, an employee must also show that [his] employer would not have taken the adverse employment action 'but for' the employee's participation in the protected activity"); *see also Septimus v. University of Houston*, 399 F.3d 601, 608 (5th Cir. 2005). Nothing has been put forward suggesting that but for his protesting of the Dixon promotion and expressing his belief that he was not promoted due to his national origin, he would not have been fired despite failing to return to work after his March 8th medical release.

Moreover, the timing of the putative retaliation, an important factor in determining the presence of a causal link, also tends to negate any inference of a causal connection between his protests and Reliable's decision. *See, e.g., Swanson v. General Servs. Admin.*, 110 F.3d 1180, 1188 (5th Cir. 1997); *Grizzle v. Travelers Health Network, Inc.*, 14 F.3d 261, 268 (5th Cir. 1994). The Supreme Court in *Clark County School District v. Breeden*, 532 U.S. 268, 273-74, 121 S. Ct. 1508, 149 L.

Ed. 2d 509 (2001) (per curiam), cited with approval circuit court decisions holding that intervals of three or four months between an employer's knowledge of protected activity and an adverse employment action were insufficient to suggest causation. Here, Sabzevari raised his concerns about Reliable's practices in the August/September 2000 timeframe. The termination letter was sent March 22, 2001, some six months or more later. This temporal gap seriously undermines any inference of retaliation by Reliable.

Further, assuming for the sake of argument that Sabzevari has established a prima facie case of retaliation, he has also offered no evidence to rebut or contradict Reliable's legitimate, non-retaliatory explanation for the termination letter, namely, that he did not return to work. Sabzevari was released to return to work without restriction by his physician on March 8, 2001. Corresponding with Sabzevari's counsel, Reliable conveyed its expectation that Sabzevari return to work when that happened.[13] Sabzevari did not do so. Reliable therefore construed Sabzevari's unexplained absence for nearly two weeks as a "constructive quit."[14] There is no proof that this was pretext for retaliation. Accordingly, there being no genuine issue of material fact, summary judgment must be granted in favor of Reliable on the retaliation claim.

3. Constructive Discharge

Reliable also moves for summary judgment on Sabzevari's constructive discharge claim, "if any," because it falls outside the scope of his EEOC charges.[15] The court agrees. As discussed above, a plaintiff must first exhaust his administrative remedies by filing a

charge with the EEOC. *Dollis v. Rubin*, 77 F.3d 777, 781 (5th Cir. 1995). A civil lawsuit filed under Title VII is "limited to the 'scope' of the EEOC investigation which can reasonably be expected to grow out of the charge of discrimination." *Sanchez v. Standard Brands, Inc.*, 431 F.2d 455, 466 (5th Cir. 1970); *see also Thomas v. Texas Dep't of Criminal Justice*, 220 F.3d 389, 395 (5th Cir. 2000). Failure to assert a claim in the charge or its lack of development in the course of a reasonable investigation of the charge precludes a plaintiff from later lodging the claim in a civil suit. *National Ass'n of Gov't Employees v. City Pub. Serv. Bd. of San Antonio*, 40 F.3d 698, 711-12 (5th Cir. 1994). Sabzevari did not assert constructive discharge in either of his EEOC charges.

This is not necessarily fatal to an assertion of discrimination if it is "like or related to" other claims of prohibited employment actions presented in the EEOC charge. *See, e.g., Dollis*, 77 F.3d at 781. That is not the case here. The following is the full text of Sabzevari's statement in his amended EEOC charge filed August 29, 2002:

> I. I have been employed with Respondent since October 1993. In August or September 2000, I began to question Respondent's practices regarding promotion and insurance agent hiring criteria which I believed to be in violation of Title VII of the Civil Rights Act of 1964, as amended. In October 2000, I requested that I be transferred back to the Austin office. Initially, the request was granted without issue. This request was not honored. Instead, I was required to move within 25 miles of Beaumont or be

demoted.

II. Reynard Rayson, District Manager, stated that I could transfer to Austin. November 21, 2000, Michael Wheeler, Division Manager, mailed me a letter stating that if I did not move within 25 miles of the district office in Beaumont, I could not continue in my current position of Assistant Manager in Beaumont.

III. I believe I am being discriminated against because of my national origin, Iranian, and in retaliation for reporting Respondent's discriminatory employment practices in violation of Title VII of the Civil Rights Act of 1964, as amended.

IV. I wish to amend this charge to include failure to promote. I was denied promotion to the position of District Manager in Missouri, on or about September 2000, due to my national origin.[16]

As is readily seen, Sabzevari's constructive discharge allegation is not like or related to the national origin and failure to promote claims in the EEOC charge. *Cf. Fine v. GAF Chem. Corp.*, 995 F.2d 576, 578 (5th Cir. 1993); *O'Brien v. Lucas Assoc. Personnel, Inc.*, 127 Fed. Appx. 702, 708 (5th Cir. 2005) (unpublished) (hostile work environment claim beyond the scope of EEOC claim where plaintiff only alleged Title VII violation for discharge/demotion); *Clayton v. Rumsfeld*, 106 Fed. Appx. 268, 271 (5th Cir. 2004) (unpublished) (finding that former employee field to raise the issue of constructive discharge in the administrative process,

and was therefore precluded from pursuing that claim in her Title VII suit).

Sabzevari therefore did not exhaust his administrative remedies on the constructive discharge claim, and Reliable must be granted summary judgment on this issue.

4. Punitive Damages

Lastly, Reliable seeks judgment as a matter of law on Sabzevari's claim for punitive damages. Under Title VII, "A complaining party may recover punitive damages under this section against a respondent ... if the complaining party demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual." 42 U.S.C. § 1981a(b)(1). No evidence offered by Sabzevari supports the assertion that Reliable acted with malice or reckless indifference. Moreover, there being no viable claims left, the issue of damages is moot.

Conclusion

For these reasons, Reliable Life Insurance Company's motion for summary judgment is GRANTED.

Signed on June 15, 2006, at Houston, Texas.

Gray H. Miller
United States District Judge

[1] Dkt. 28, Ex. 1.

[2] *See* Dkt. 28, Ex. 10B-10F.

[3] *See* Dkt. 28, Ex. 10G.

[4] *See* Dkt. 28, Ex. 5.

[5] *See* Dkt. 28, Ex. 1.

[6] *See* Dkt. 28, Ex. 1.

[7] One of the central purposes of the EEOC charge is to put the employer on notice of the existence and nature of the charges. *Manning v. Chevron Chem. Co., LLC*, 332 F.3d 874, 878-79 (5th Cir. 2003), *cert. denied*, 540 U.S. 1107, 124 S. Ct. 1060, 157 L. Ed. 2d 892 (2004). Allowing a complaint to encompass allegations outside of the ambit of the predicated EEOC charge would frustrate the EEOC's investigatory and conciliatory role, as well as deprive the charged party of notice of the charge. *Cheek v. Western & S. Life Ins. Co*, 31 F.3d 497, 500 (7th Cir. 1994); *see also Clayton v. Rumsfeld*, 106 Fed. Appx. 268, 271 (5th Cir. 2004) (unpublished).

[8] Texas is a "deferral" state, meaning that claimants in Texas must file their charge of discrimination within 300 days after the alleged unlawful employment practice occurred. *See Huckabay v. Moore*, 142 F.3d 233, 238 (5th Cir. 1998); *Blumberg v. HCA Mgmt. Co., Inc.*, 848 F.2d 642, 645 (5th Cir. 1988), *cert. denied*, 488 U.S. 1007, 109 S. Ct. 789, 102 L. Ed. 2d 781 (1989).

[9] A common equitable exception is for continuing violations. Under the continuing violation theory, a court may consider otherwise time-barred incidents that occurred outside the three hundred day statutory period. *See, e.g., Waltman v. International Paper Co.*, 875 F.2d 468, 474 (5th Cir. 1989). A failure to promote, however, is considered a discrete discriminatory act that occurs on a given day, rather than a continuing violation. *See National R.R. Corp. v. Morgan*, 536 U.S. 101, 114 (2002). "[D]iscrete discriminatory acts are not actionable if time barred, even when they are related to

acts alleged in timely filed charges." *Id.* at 113. Thus, the continuing violation exception does not apply, nor does Sabzevari invoke the "relation back" doctrine.

[10] *See* Dkt. 36, p. 14.

[11] *But see Randlett v. Shalala*, 118 F.3d 857, 862 (1st Cir. 1997) (refusal to transfer can support retaliation claim where such is a customary practice).

[12] Dkt. 36, p. 14.

[13] *See* Dkt. 28, Ex. 10B-10E.

[14] Dkt. 28, Ex. 10G.

[15] Reliable points out that Sabzevari did not plead constructive discharge in his complaint. *See* Dkt. 1. Sabzevari counters that he did not quit -- Reliable terminated him. *See* Dkt. 36, n.11. Sabzevari offers the constructive discharge claim in his response to the summary judgment motion in the alternative -- to the extent that the trier of fact might conclude he quit, then he maintains he was constructively discharged. *Id.* Because the court has found that Sabzevari left his employment with Reliable before Reliable terminated him, and because Sabzevari is the non-movant, the court will give the plaintiff the benefit of the doubt on this matter and address the constructive discharge claim.

[16] Dkt. 28, Ex. 1.

CIVIL ACTION H-03-3240

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION

MEHRDAD SABZEVARI, Plaintiff, vs. THE RELIABLE LIFE INSURANCE CO., Defendant.

August 10, 2006, Decided
August 10, 2006, Filed

COUNSEL: For Mehrdad Sabzevari, Plaintiff: Stephen J Schechter, Attorney at Law, Seabrook, TX.

For The Reliable Life Insurance Company, Defendant: G Mark Jodon, Allan Huddleston Neighbors, IV, Littler Mendelson, Houston, TX.

JUDGES: Gray H. Miller, United States District Judge.

OPINION BY: Gray H. Miller

OPINION

MEMORANDUM AND ORDER

Before the court is plaintiff Mehrdad Sabzevari's motion to vacate (Dkt. 42) the opinion on summary judgment issued June 15, 2006. This motion is granted in part; denied in part. The court will vacate that portion of the opinion impacted by the Supreme Court's recent decision in *Burlington Northern & Santa Fe Ry.*

v. White, 548 U.S. ___, 548 U.S. 53, 126 S. Ct. 2405, 165 L. Ed. 2d 345 (2006). The court's ultimate granting of summary judgment in favor of The Reliable Life Insurance Co., however, will remain undisturbed for the reasons explained below.

LEGAL STANDARDS

Federal Rule of Civil Procedure 59(e) allows a party to file a motion to alter or amend judgment within 10 days after entry of judgment. Rule 59(e) has been interpreted as covering motions to vacate judgments, in addition to motions to modify or amend. *See Edward H. Bohlin Co. v. Banning Co.*, 6 F.3d 350, 355 (5th Cir. 1993) (*citing Foman v. Davis*, 371 U.S. 178, 181, 83 S. Ct. 227, 9 L. Ed. 2d 222) (1962)). Although reconsideration of a judgment after its entry is an extraordinary remedy that should be used sparingly, a Rule 59(e) motion may be justified by an intervening change in controlling law. *See Templet v. HydroChem Inc.*, 367 F.3d 473, 479 (5th Cir. 2004); 11 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2810.1 (2d 1995). On the other hand, Rule 59(e) is not simply a vehicle to reargue facts and theories upon which a court has already ruled, or to raise new arguments that could have been presented before judgment was entered. *See, e.g., Zimmerman v. City of Oakland*, 255 F.3d 734, 740 (9th Cir. 2001); *Steele v. Young*, 11 F.3d 1518, 1520 n.1 (10th Cir. 1993); *Fox v. Am. Airlines, Inc.*, 295 F. Supp. 2d 56, 59 (D.D.C. 2003); *Range Road Music, Inc. v. Music Sales Corp.*, 90 F. Supp. 2d 390, 391-92 (S.D.N.Y. 2000); *see also Simon v. United States*, 891 F.2d 1154, 1159 (5th Cir. 1990) ("[Rule 59(e)] motions cannot be used to raise

arguments which could, and should, have been made before the judgment issued").

Under Rule 60(b)(6), a court may relieve a party from a final judgment for "(6) any other reason justifying relief from the operation of the judgment" based on a motion made within a reasonable time. In the Fifth Circuit, however, a subsequent change in decisional law is not a basis for invoking Rule 60(b)(6). In this circuit, relief under Rule 60(b)(6) will be granted only if extraordinary circumstances are present. *Bailey v. Ryan Stevedoring Co.*, 894 F.2d 157, 160 (5th Cir. 1990), *cert. denied*, 498 U.S. 829, 111 S. Ct. 89, 112 L. Ed. 2d 61 (1990). A change in decisional law after entry of judgment does not constitute exceptional circumstances and is not alone grounds for relief from a final judgment. *Bailey*, 894 F.2d at 160; *United States ex rel. Garibaldi v. Orleans Parish Sch. Bd.*, 397 F.3d 334, 337 (5th Cir. 2005), *cert. denied*, 546 U.S. 813, 126 S. Ct. 335, 163 L. Ed. 2d 47 (2005). The court will therefore confine its consideration to Rule 59(e).

ANALYSIS

The court interprets Sabzevari's motion as seeking to vacate (1) that portion of the opinion relying on the proposition that an "adverse employment action" is limited to "ultimate employment actions, " and (2) those portions of the opinion granting summary judgment on plaintiff's failure to promote and constructive discharge claims. As to the second portion, the motion does not demonstrate a need to revisit these issues. As explained in the opinion, Reliable is clearly entitled to judgment as a matter of law on both the failure to promote and constructive discharge claims because

they were not a part of Sabzevari's EEOC charge. Sabzevari simply reurges his prior argument that these claims were properly before the court.

Turning to the retaliation claim, as the parties are already familiar with the facts and reasoning set forth in the summary judgment opinion, the court will not repeat them at length here. Sabzevari alleged Reliable retaliated against him with respect to two discrete employment actions: (i) by denying him a lateral transfer from Beaumont to Austin, and (ii) by terminating his employment.[1]

As discussed in the summary judgment opinion, a prima facie claim of retaliation has three elements: (1) the employee engaged in activity protected by Title VII; (2) the employer took adverse action against the employee; and (3) a causal connection exists between the protected activity and the adverse employment action. *See Hockman v. Westward Communs., LLC*, 407 F.3d 317, 330, 122 Fed. Appx. 734 (5th Cir. 2004); *Walker v. Thompson*, 214 F.3d 615, 628-29 (5th Cir. 2000). A recent Supreme Court opinion has clarified what may constitute an "adverse employment action" and the court's analysis will be limited to reexamining that portion of its summary judgment opinion concerning this second factor.

1. Denial of a Lateral Transfer

Examining first the alleged denial of a lateral transfer from Beaumont to Austin, the summary judgment opinion noted that under Fifth Circuit case law, an employment decision was only adverse where it was an "ultimate employment decision." *Mattern v. Eastman*

Kodak Co., 104 F.3d 702, 707-08 (5th Cir. 1997), *cert. denied*, 522 U.S. 932, 118 S. Ct. 336, 139 L. Ed. 2d 260 (1997). Under this standard, the denial of the transfer request to Austin was not an ultimate employment decision and thus not an adverse employment action. *See, e.g., Burger v. Cent. Apt. Mgmt.*, 168 F.3d 875, 879 (5th Cir. 1999) ("[r]efusing an employee's request for a purely lateral transfer does not qualify as an ultimate employment decision"); *see also Wakefield v. State Farm Ins.*, 229 F.3d 1148 (5th Cir. 2000) (unpublished table decision) (an opportunity to be reviewed for a promotion or a lateral move is not an ultimate employment decision).

The standard for showing an adverse employment action has since changed, and therefore the court will vacate that portion of its opinion relying on the "ultimate employment decision" criteria. In *Burlington Northern & Santa Fe Ry. v. White*, 126 S. Ct. 2405, 2415, the Supreme Court adopted the formulation of "adverse employment action" set forth by the Seventh and the District of Columbia Circuits. An "adverse employment action" is now one that a reasonable employee would find to be materially adverse, *i.e.*, one that might dissuade a reasonable worker from making or supporting a charge of discrimination under Title VII of the Civil Rights Act of 1964. *See id.* Despite this change, Sabzevari's retaliation claim nevertheless still fails under *Burlington Northern* and its adoption of the "material adverse" standard of the Seventh and District of Columbia Circuits. The plaintiff has not provided summary judgment evidence showing that he suffered a material employment action, and thus does not raise a genuine issue of material fact that he suffered an adverse employment action.

In the summary judgment opinion, the court noted that the Seventh Circuit holds that apurely lateral transfer is not generally a materially adverse employment action. The Seventh Circuit has posited that:

> Obviously a *purely* lateral transfer, that is, a transfer that does not involve a demotion in form or substance, cannot rise to the level of a materially adverse employment action. A transfer involving no reduction in pay and no more than a minor change in working conditions will not do, either. Otherwise every trivial personnel action that an irritable, chip-on-the-shoulder employee did not like would form the basis of a discrimination suit.

Williams v. Bristol-Myers Squibb Co., 85 F.3d 270, 274 (7th Cir. 1996) (emphasis in original) (citations omitted).

The Seventh Circuit holds that a transfer, or the denial of a transfer, is not normally an "adverse employment action." *See, e.g., Washington v. Ill. Dep't of Revenue*, 420 F.3d 658, 661-62 (7th Cir. 2005); *Herrnreiter v. Chicago Housing Auth.*, 315 F.3d 742, 745 (7th Cir. 2002), *cert. denied*, 540 U.S. 984, 124 S. Ct. 472, 157 L. Ed. 2d 375 (2003); *Williams v. Bristol-Myers Squibb Co.*, 85 F.3d 270, 274 (7th Cir. 1996). "By and large a reassignment that does not affect pay or promotion opportunities lacks this potential to dissuade and thus is not actionable." *Washington*, 420 F.3d at 662. Sabzevari has put forth no evidence that the transfer to Austin would have affected his pay or promotional opportunities; the two positions were identical other than Sabzevari's personal preference for the Austin position. Particularly on point is *Herrnreiter*, 315 F.3d

at 745, where the Seventh Circuit explained that where two jobs are equivalent, other than in idiosyncratic terms-such as the purely subjective preference of the employee for one position over another-an employer's refusal to transfer an employee from one position to another is not an adverse employment action for purposes of retaliation.

Sabzevari's denied request for a purely lateral transfer fares no better under District of Columbia Circuit case law. The District of Columbia Court of Appeals has also explained that

> The clear trend of authority . . . is to hold that a purely lateral transfer, that is, a transfer that does not involve a demotion in form or substance, cannot rise to the level of a materially adverse employment action. A survey of the relevant case law shows that the authority requiring a clear showing of adversity in employee transfer decisions is both wide and deep.

Brown v. Brody, 339 U.S. App. D.C. 233, 199 F.3d 446, 455-56 (D.C. Cir. 1999) (internal quotation marks and citations omitted). In *Brown*, as in this case, the plaintiff claimed retaliation where she was transferred to a position she did not desire and later refused a transfer to a position she did desire. *Id.*

The District of Columbia Circuit later added:

> Actions short of an outright firing can be adverse withing the meaning of Title VII, but not all lesser actions by employers count. As we wrote in *Brown*, 199 F.3d at 457, "[m]ere idiosyncracies

> of personal preference are not sufficient to state an injury." *See Williams v. Bristol-Myers Squibb Co.*, 85 F.3d 270, 274 (7th Cir. 1996). Purely subjective injuries, such as dissatisfaction with a reassignment, *see Brown*, 199 F.3d at 457, or public humiliation or loss of reputation, *see Stewart v. Evans*, 348 U.S. App. D.C. 382, 275 F.3d 1126, 1136 (D.C. Cir. 2002), are not adverse actions.

Forkkio v. Powell, 353 U.S. App. D.C. 301, 306 F.3d 1127, 1130-31 (D.C. Cir. 2002) (footnote omitted).

2. Termination of Employment

The Supreme Court's opinion in *Burlington Northern* does not affect the court's analysis of Sabzevari's purported retaliatory termination. That section of the summary judgment opinion will not be altered.

CONCLUSION

Accordingly, plaintiff Mehrdad Sabzevari's motion to vacate the summary judgment opinion issued June 15, 2006 is GRANTED in part; DENIED in part. The judgment in favor of defendant Reliable Life Insurance Co. remains unchanged.

Signed on August 10, 2006, at Houston, Texas.

Gray H. Miller/United States District Judge

Footnote

[1] *See* Dkt. 36, p. 14.

Filed 2/26/2008

No. 06-20888

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

MEHRDAD SABZEVARI,
Plaintiff-Appellant

v.

THE RELIABLE LIFE INSURANCE COMPANY,
Defendant-Appellee

Appeal from the United States District Court for the Southern District of Texas.

ON PETITION FOR REHEARING

JUDGES: Before JONES, Chief Judge, and WIENER and CLEMENT, Circuit Judges.

IT IS ORDERED that the petition for rehearing is denied.

No. 07-1494

FILED
JUL 1 - 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

MEHRDAD SABZEVARI,

Petitioner,

v.

THE RELIABLE LIFE INSURANCE COMPANY,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

Petitioner seeks *certiorari* solely because he disagrees with the lower courts' factual findings and application of settled legal standards in this employment discrimination case. Petitioner's Statement of Questions Presented, however, attempts to present these insufficient grounds for Supreme Court review as purported opportunities to resolve important questions of federal law. Respondent submits the following Counter-Statement of Questions Presented to appropriately characterize the true nature of the review that Petitioner seeks.

1. Whether the Fifth Circuit Court of Appeals applied well-settled law in affirming summary judgment in favor of Respondent under Federal Rule of Civil Procedure 56(c) because Petitioner failed to raise a genuine issue of material fact on his Title VII failure-to-promote and retaliation claims.

2. Whether the Fifth Circuit Court of Appeals' evaluation of the evidentiary record and decision to affirm summary judgment on Petitioner's wrongful termination claim are consistent with the firmly-established doctrine of constructive discharge under Title VII.

THE PARTIES

1. Petitioner Mehrdad Sabzevari ("Petitioner") is a former assistant manager of The Reliable Life Insurance Company. Petitioner worked in Respondent's Beaumont, Texas district office.

2. Respondent The Reliable Life Insurance Company ("Respondent") markets life insurance products in Texas and other parts of the United States. Respondent is an "employer" as that term is defined by Title VII. Unitrin, Inc. is the parent corporation of Respondent. Unitrin, Inc. is publicly held and owns more than 10% of Respondent's stock.

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OPINIONS BELOW

The District Court's Opinion and Order granting complete summary judgment to Respondent on all of Petitioner's Title VII claims is unreported and is included at pages 11a-27a of the Appendix to the Petition. The District Court's Memorandum and Order partially vacating the summary judgment opinion, but refusing to alter the grant of complete summary judgment to Respondent, is also unreported and is attached at pages 28a-35a of the Appendix to the Petition.

The Judgment Order of the Court of Appeals affirming the District Court's grant of summary judgment to Respondent is unreported and is included at pages 1a-10a of the Appendix to the Petition. The Court of Appeals' Order denying Petitioner's request for rehearing is also unreported and is included at page 36a of the Appendix to the Petition.

STATEMENT OF THE CASE

Petitioner's Statement of the Case is rife with inaccuracies, immaterial allegations, and omissions of critical undisputed facts. The following Statement of the Case accurately reflects the relevant portions of the undisputed factual record, as well as the lower courts' decisions dismissing Petitioner's Title VII discrimination and retaliation claims.

I. THE MATERIAL UNDISPUTED FACTS

A. Petitioner Becomes Employed by Respondent and Accepts a Transfer to the Beaumont District Office

Respondent hired Petitioner as an insurance agent in 1993. (App. 12a). In August 1996, Respondent promoted Petitioner to assistant manager in its Austin, Texas district office. (App. 12a). Respondent's Division Director at the time, Don Hirschfeld ("Hirschfeld"), was responsible for both the decision to hire Petitioner and the decision to promote him to assistant manager. (Record 397). In August 1999, Petitioner accepted a transfer to Respondent's district office in Beaumont, Texas, where he remained an assistant manager. (App. 12a).

Upon transferring to the Beaumont office, Petitioner lived in League City, Texas. (Record 322). Petitioner's residence in League City was not in Respondent's Beaumont district. (Record 310). Since at least the 1960s, however, Respondent has maintained a policy that managers must live within the district to which they are assigned. (App. 8a-9a). Indeed, all Beaumont managers – except for Petitioner – lived inside the Beaumont district's boundaries. (Record 320). Despite being requested to do so, Petitioner never moved within the Beaumont district. (Record 310).

B. Respondent Promotes Doug Dixon to District Manager in Sikeston, Missouri

In June 2000, Hirschfeld approached Doug Dixon ("Dixon"), another assistant manager in Respondent's Beaumont office, to inquire whether Dixon was interested in relocating to Sikeston, Missouri, as district manager. (Record 389). Hirschfeld interviewed Dixon for the Sikeston district manager position in July 2000, and later selected him for the job. (Record 391). Hirschfeld neither interviewed nor considered any other person for this position. (Record 320). Respondent formally promoted Dixon to Sikeston district manager in September 2000. (App. 2a, 12a).

At the meeting announcing Dixon's promotion, Petitioner declared that he did not receive the Sikeston district manager position because he is Iranian. (App. 2a). Petitioner, however, admittedly does not believe that Hirschfeld discriminated against him in the selection process for the Sikeston job or otherwise. (Record 333). Rather, Petitioner acknowledges that Hirschfeld was always courteous and respectful to him, and that Hirschfeld had no problem working with Iranians. (Record 333). Notably, Hirschfeld had already promoted Petitioner to assistant manager and also promoted Bob Sohrabi – another employee of Iranian national origin – to the district manager position in Waco, Texas prior to Dixon's promotion. (*See* Record 315, 397).

Hirschfeld selected Dixon for the Sikeston district manager position because he believed Dixon was the most qualified person for the job. (Record 396). Dixon had worked for Respondent since 1985 and had served as an assistant manager in the Beaumont office since 1996. (Record 386-87). Through Hirschfeld's personal observations of Dixon's career with Respondent, Hirschfeld believed that Dixon's strong leadership skills, work ethic, and work performance made him the best candidate for the Sikeston district manager position. (Record 396). Hirschfeld further provided unrebutted testimony that, even if he had considered Petitioner for the district manager position, he would nevertheless have selected Dixon over Petitioner because he knew Dixon to have superior leadership qualities, a longer tenure with Respondent, a longer tenure as an assistant manager, a superior work ethic, better management skills, a greater willingness to interact with agents, and a better attitude compared to Petitioner. (Record 397). Most, if not all, of these qualities are indisputably central to the qualifications of a district manager. (*See* Record 500-01).

C. Petitioner Seeks a Lateral Transfer to Assistant Manager in the Austin Office

In October 2000, Petitioner requested a transfer from his assistant manager position in Beaumont to an assistant manager position in Respondent's Austin district office. (Record 306). Petitioner did not receive the transfer to Austin that he requested. (Record

325). The record contains no evidence that the Austin assistant manager position would have involved a change in pay, promotional opportunities, or some other objective aspect of Petitioner's employment with Respondent. (App. 7a, 33a). At most, the record reflects Petitioner's mere belief that he would feel "more secure" about his future in Austin. (App. 20a; Record 325).

D. Petitioner Goes Out on Medical Leave and Accepts Employment with American National

In January 2001, Petitioner took a medical leave of absence from his employment with Respondent. (App. 12a). While on leave, Petitioner applied for employment with American National Insurance Company ("American National"). (App. 2a; Record 355-56). On March 8, 2001, Petitioner's doctor released him to return to work without restriction. (App. 2a). Petitioner, however, did not return to his job with Respondent. (App. 2a; Record 332). Instead, Petitioner accepted employment with American National on March 19, 2001. (App. 2a). Three days later, Respondent sent Petitioner a letter terminating his employment for failing to return to work after being released by his doctor. (App. 2a).

E. Petitioner Files an EEOC Charge and – 17 Months Later – Amends the Charge to Include a Failure-to-Promote Claim

Petitioner filed a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC") on March 15, 2001. (App. 2a). This charge alleged national origin discrimination and retaliation based on: (1) the denial of Petitioner's transfer request to Austin; and (2) Respondent's requests that Petitioner live within 25 miles of the Beaumont office like the other managers in his district. (App. 14a). On August 25, 2002 – more than 17 months after filing his charge with the EEOC – Petitioner amended the charge to add an allegation that Respondent failed to promote him to the Sikeston district manager position in September 2000 because of his Iranian national origin. (App. 3a).

II. PETITIONER'S CLAIMS

Petitioner filed a complaint against Respondent in the United States District Court for the Southern District of Texas on August 13, 2003, alleging multiple claims under Title VII of the Civil Rights Act of 1964, as amended. (Record 8-10). Petitioner alleged that Respondent did not promote him to the Sikeston district manager position because he is Iranian. Petitioner also alleged that Respondent took certain actions against him – denying his transfer request to Austin, requiring him to move within 25 miles of the Beaumont district office, and terminating his

employment – in retaliation for engaging in Title VII protected activity.

III. THE DISTRICT COURT DISMISSES ALL OF PETITIONER'S CLAIMS

On June 15, 2006, the District Court granted Respondent's motion for summary judgment and entered a final judgment dismissing all of Petitioner's claims. The District Court held that Petitioner's national origin discrimination claim was barred because Petitioner failed to exhaust his administrative remedies. (App. 16a-17a). Specifically, the District Court held that Petitioner did not submit his failure-to-promote claim to the EEOC within 300 days after he learned that Respondent promoted Dixon to Sikeston district manager. (App. 16a-17a). The District Court also held that Petitioner failed to establish a *prima facie* case of Title VII retaliation due to his failure to present evidence of an adverse employment action. (App. 20a, 22a). In so holding, the District Court found: (1) that Respondent did not terminate Petitioner, but, rather, Petitioner voluntarily quit (App. 22a); and (2) that Petitioner presented no competent evidence to show that the denied transfer to Austin would have been more than a purely lateral move (App. 20a).[1] Third, the District Court

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[1] In his Response to Respondent's Amended Motion for Summary Judgment, Petitioner expressly limited the scope of his retaliation claim to denial of the transfer to Austin and his termination from Respondent: "Mr. Sabzevari suffered two

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held that Petitioner's constructive discharge claim – if any existed – was barred because it, too, was not part of a timely filed charge of discrimination with the EEOC. (App. 25a).

On June 22, 2006, the Supreme Court clarified the adverse employment action standard for Title VII retaliation claims in *Burlington Northern & Santa Fe Railway Co. v. White*, 126 S. Ct. 2405 (2006). Because *White* changed the law in the Fifth Circuit, Petitioner moved to vacate the District Court's summary judgment opinion and order dated June 15, 2006. On August 10, 2006, the District Court granted the motion to vacate in part, re-analyzed Petitioner's retaliation allegations under the new "materially adverse" standard endorsed in *White*, and issued an order declining to alter the summary judgment in favor of Respondent. In doing so, the District Court reiterated: (1) that Respondent did not terminate Petitioner (App. 35a); and (2) that the denied transfer to Austin was purely lateral and, therefore, could not satisfy even the more lenient "materially adverse" standard (App. 33a-34a).

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specific adverse employment actions. First, his transfer to Austin was denied and, second, he was terminated." (Record 448). The District Court therefore properly limited its analysis to these two adverse actions in analyzing Petitioner's retaliation claim. (*See* App. 18a).

IV. THE FIFTH CIRCUIT COURT OF APPEALS AFFIRMS THE DISTRICT COURT'S GRANT OF SUMMARY JUDGMENT

Petitioner timely filed a Notice of Appeal from the District Court's final judgment on September 8, 2006. The Fifth Circuit Court of Appeals affirmed the judgment on January 31, 2008.

The Fifth Circuit declined to address whether Petitioner had failed to exhaust his administrative remedies on the failure-to-promote claim. (App. 4a). Instead, the Fifth Circuit opted to affirm summary judgment on grounds that Respondent articulated a legitimate, nondiscriminatory reason for promoting Dixon to district manager and that Petitioner could not show this reason was a pretext for national origin discrimination. (App. 5a-6a). Specifically, Respondent articulated that Hirschfeld selected Dixon for the Sikeston, Missouri district manager position because he was the most qualified candidate, and Petitioner failed to raise a material fact issue as to whether he was "clearly better qualified" than Dixon or that Dixon should have been disqualified from receiving the promotion. (App. 5a-6a).

The Fifth Circuit also affirmed the District Court's dismissal of the Title VII retaliation claim because: (1) Petitioner presented no competent evidence that the denied transfer to Austin was anything but purely lateral and, thus, was not an adverse employment action (App. 7a); (2) Petitioner was not terminated, but voluntarily quit his employment with

Respondent (App. 8a); and (3) Petitioner presented no competent evidence to either dispute the longstanding existence of Respondent's policy requiring managers to live within their respective districts or raise a fact issue that Respondent created this policy as a pretext for retaliating against Petitioner (App. 9a).

The Fifth Circuit did not resolve whether Petitioner had properly raised a constructive discharge claim either before the EEOC or in the District Court. The Fifth Circuit did, however, make the necessary findings to affirm dismissal of such a claim (if any) by concluding that Petitioner had presented legally insufficient evidence to establish a predicate hostile work environment claim. (App. 8a-9a).

Petitioner requested a panel rehearing of the Fifth Circuit's decision on February 13, 2008. In the request, Petitioner argued for a rehearing based on his allegations that the Fifth Circuit had made erroneous factual findings and misapplied the summary judgment standard under Federal Rule of Civil Procedure 56. The Fifth Circuit appropriately denied this petition for panel rehearing on February 26, 2008.

V. PETITIONER FILES A PETITION FOR WRIT OF *CERTIORARI*

Petitioner filed a Petition for Writ of *Certiorari* in this Honorable Court on May 27, 2008. The Petition was docketed on June 2, 2008.

REASONS FOR DENYING THE PETITION

I. THE CRITERIA OF SUPREME COURT RULE 10 ARE NOT SATISFIED

This Court has complete discretion in determining whether to grant a petition for writ of *certiorari* and, indeed, will grant a petition only for compelling reasons. (Sup. Ct. R. 10). As a general rule, a petition that complains of "erroneous factual findings" or "the misapplication of a properly stated rule of law" will not suffice. (Sup. Ct. R. 10). Rather, Petitioner must show that the Court of Appeals' decision to affirm summary judgment in favor of Respondent either: (1) conflicts with a decision of another United States court of appeals; or (2) decided an important, but unsettled, question of federal law in conflict with decisions of this Court. (*See* Sup. Ct. R. 10).

None of the circumstances under which the Supreme Court will consider granting *certiorari* exist in this case. The Court of Appeals did not decide an important question of unsettled federal law. Nor did it decide a federal question in a way that conflicts with another court of appeals or a decision of this Court. To be sure, the only purported "questions" of federal law raised by Petitioner – the basic summary judgment standard under Federal Rule of Civil Procedure 56(c), and the existence of constructive discharge claims under Title VII – are solidly and uniformly established across the federal courts.

Petitioner does not credibly assert that the courts below departed from these well-established legal

principles to announce or apply a new rule of law. Rather, Petitioner is simply dissatisfied with how the Fifth Circuit and the District Court applied rules of law (under Federal Rule of Civil Procedure 56 and Title VII) that have been universally accepted for decades. Practically speaking, Petitioner seeks *certiorari* for no other reason than to have this Court wade through the record in search of a genuine issue of material fact on his Title VII claims that both the Court of Appeals and District Court could not find. This is far from a compelling reason for this Court's review under Supreme Court Rule 10, and the Petition should be denied in its entirety.

II. THE COURT OF APPEALS APPLIED SETTLED LAW TO DECIDE THAT PETITIONER FAILED TO RAISE A GENUINE ISSUE OF MATERIAL FACT ON HIS TITLE VII FAILURE-TO-PROMOTE AND RETALIATION CLAIMS

A. The Standard for Granting Summary Judgment Under Federal Rule of Civil Procedure 56 is Exceedingly Uniform and Well-Established

The guiding principles for applying the summary judgment standard in the Fifth Circuit are the same as in the other courts of appeals, and any assertion to the contrary by Petitioner is incorrect. The Fifth Circuit consistently holds that in determining whether a party has raised a genuine issue of material fact sufficient to stave off summary judgment, the

court "must view all facts and inferences in the light most favorable to the nonmoving party" and "must not weigh the evidence or evaluate the credibility of witnesses." *Boudreaux v. Swift Transp. Co.*, 402 F.3d 536, 540 (5th Cir. 2005) (internal quotations omitted); *see also Austin v. Will-Burt Co.*, 361 F.3d 862, 866 (5th Cir. 2004) (stating that, on a summary judgment analysis, the court does "not make credibility determinations or the weigh the evidence" and "should draw all reasonable inferences in favor of the nonmoving party"). One need only look to the cases cited in the Petition to see that these same summary judgment principles are also firmly established in the other circuits. (*See* Petition 8 (collecting cases)).

Equally well-established across the federal courts – including the Fifth Circuit – is the rule of law that Federal Rule of Civil Procedure 56:

> *mandates* the entry of summary judgment . . . against a party who fails to make a showing sufficient to establish the existence of an essential element to that party's case, and on which that party will bear the burden of proof at trial.

Little v. Liquid Air Corp., 37 F.3d 1069, 1075 (5th Cir. 1994) (en banc) (quoting *Celotex Corp. v. Catrett*, 106 S. Ct. 2548, 2552 (1986)) (emphasis added); *accord, e.g.*, *Depositors Ins. Co. v. Wal-Mart Stores, Inc.*, 506 F.3d 1092, 1094 (8th Cir. 2007); *Bruner v. Baker*, 506 F.3d 1021, 1025 (10th Cir. 2007); *Smith v. Allen*, 502 F.3d 1255, 1265 (11th Cir. 2007). The reasons for this

rule are simple and necessary, but ultimately discounted by Petitioner:

> Notwithstanding the long history of summary judgment procedure, some parties will always complain that summary judgment unfairly deprives a party of the right to have a case heard by the trier of fact. No one, however, should be heard to question the fairness of requiring a party to meet basic evidentiary and procedural burdens in the trial of a case. Summary judgment requires no more.

Little, 37 F.3d at 1076. In this case, the Fifth Circuit did not misstate these well-established principles or depart from them to announce a new rule of law for determining whether a party is entitled to summary judgment under Rule 56.

The Fifth Circuit did not, as Petitioner erroneously contends, "render[ ] a decision that conflicts with decisions from the Supreme Court and decisions from other appellate courts."[2] (*See* Petition 7). To the

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[2] Petitioner's allusion to *Reeves v. Sanderson Plumbing Products, Inc.*, 120 S. Ct. 2097 (2000), is potentially misleading. The Supreme Court did not grant *certiorari* in *Reeves* based on any perceived (or real) conflict among Fifth Circuit law and the law in other circuits regarding application of the standards for dismissal under Federal Rule of Civil Procedure 50 or 56. Rather, the Court granted *certiorari* on a Title VII question and, more specifically, "to resolve a conflict among the circuits as to whether a plaintiff's *prima facie* case of discrimination . . . , combined with sufficient evidence for a reasonable factfinder to reject the employer's nondiscriminatory explanation for its

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contrary, the Fifth Circuit did nothing more than correctly apply settled rules of law to decide that Petitioner's claims could not survive summary judgment. As foreshadowed by the *en banc* Fifth Circuit in *Little*, Petitioner – undoubtedly like many plaintiffs before him – is simply dissatisfied with the outcome. Petitioner's mere dissatisfaction with the Fifth Circuit's application of settled law is not a sufficient reason for Supreme Court review. (*See* Sup. Ct. R. 10).

B. The Court of Appeals Correctly Applied the Established Summary Judgment Standard to Affirm Dismissal of Petitioner's Failure-to-Promote Claim

The Fifth Circuit correctly applied established law to decide that Petitioner failed to raise a genuine issue of material fact on his Title VII failure-to-promote claim. The Fifth Circuit did not weigh the material evidence on this (or any other) claim. It also did not assess the credibility of witnesses as to the material facts. Nor did it somehow fail to draw

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decision, is adequate to sustain a finding of liability for intentional discrimination" as opposed to requiring a plaintiff to submit evidence for a jury to find both that the employer's reason for the action was false and that the real reason was discrimination. *Reeves*, 120 S. Ct. at 2104-05. Here, Petitioner is not attempting to certify a Title VII question, and, as already noted, no conflict exists among the courts of appeals regarding the summary judgment standards under Federal Rule of Civil Procedure 56.

reasonable inferences on material matters in favor of Petitioner. In arguing to the contrary, Petitioner ignores the specific holdings of the Fifth Circuit and focuses on immaterial facts.

The Fifth Circuit correctly concluded that Petitioner failed to raise a material fact issue of pretext by showing that he was "clearly better qualified" than Dixon for the Sikeston district manager position. *See EEOC v. La. Office of Cmty. Servs.*, 47 F.3d 1438, 1445 (5th Cir. 1995) (holding that employee must be "clearly better qualified" rather than "merely better or as qualified" to establish pretext on failure-to-promote claim). Petitioner claims that the Fifth Circuit "violated" Federal Rule of Civil Procedure 56 by misapprehending evidence that Petitioner was a better recruiter than Dixon. Respondent, however, presented unrebutted testimony that recruiting was merely one of a number of credentials – including leadership skills, longevity, and being able to take care of policyholders and agents – germane to the district manager position. (*See* Record 500-01). On this evidence, the Fifth Circuit determined under Rule 56 that *even if accepting as true* that "Petitioner established that he had superior recruiting skills, this would not raise an issue as to whether he was 'clearly better qualified' on the whole." (App. 6a). The Fifth Circuit's analysis and decision to dismiss Petitioner's failure-to-promote claim was a straightforward

application of established summary judgment principles.[3]

The Fifth Circuit also correctly concluded that Petitioner failed to establish pretext on the failure-to-promote claim by showing that Dixon should have been disqualified from the Sikeston district manager position. Petitioner claims that the Fifth Circuit misapplied Rule 56 by disregarding the fact that Dixon incurred two infractions of company policy during his career with Respondent (and years prior to his promotion to Sikeston district manager). However, Dixon's infractions did not create a fact issue which was either genuine or material to Petitioner's failure-to-promote claim. In particular, Petitioner offered no evidence of a company policy or past promotional decision to support the unfounded conclusion that these remote infractions forever rendered Dixon ineligible for a district manager position with Respondent. Nor did Petitioner offer any other

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[3] A case cited by Petitioner, *Hux v. City of Newport News*, 451 F.3d 311 (4th Cir. 2006), squarely supports the appropriateness of the Fifth Circuit's summary judgment analysis and ultimate decision to dismiss Petitioner's failure-to-promote claim. In *Hux*, the Fourth Circuit relied upon *Anderson v. Liberty Lobby, Inc.*, 106 S. Ct. 2505 (1986), to likewise dismiss a failure-to-promote claim after holding that "in a suit alleging failure to promote, a plaintiff seeking to rebut an employer's reliance on inferior job qualifications cannot simply compare herself to other employees on the basis of a single evaluative factor artificially severed from the employer's focus on multiple factors in combination." *Hux*, 451 F.3d at 315. That is precisely what Petitioner attempted to do in this case.

evidence capable of establishing that the effect of Dixon's two policy infractions was automatic disqualification from promotion. The Fifth Circuit, therefore, correctly applied established summary judgment standards in deciding that Petitioner failed to raise an issue of material fact on the pretext prong of his failure-to-promote claim.[4]

Additionally, if Petitioner had raised a material fact issue as to pretext, the Fifth Circuit could have also affirmed summary judgment on the failure-to-promote claim on alternative grounds. Specifically, summary judgment was also proper because, as the District Court correctly held, Petitioner did not timely submit his failure-to-promote allegation to the EEOC. (*See* App. 16a-17a); 42 U.S.C. § 2000e-5(e).

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[4] Petitioner curiously devotes a substantial portion of his Petition to mischaracterizing the testimony of Respondent's Director of Agencies, Grant Pillow, to support his failure-to-promote claim. The unrebutted evidence shows that Hirschfeld – not Pillow – selected Dixon for promotion to Sikeston district manager over Petitioner. Additionally, Petitioner's statement that "[a]ccording to Mr. Pillow, Mr. Sabzevari was more qualified for the District Manager position since he did not have a history of recruiting problems" is false. (*See* Petition 10). Pillow simply made no such statement. Rather, Pillow straightforwardly testified that recruiting was merely one of a number of relevant qualities of a district manager. (*See* Record 500-01). Perhaps most importantly, however, Petitioner offered no evidence to cast doubt upon the legitimacy of Hirschfeld's basis for selecting Dixon for the Sikeston position. (*See* Record 396-97). This is an additional compelling reason why Petitioner failed to create a material fact issue on the pretext prong of his failure-to-promote claim.

C. The Court of Appeals Correctly Applied the Established Summary Judgment Standard to Dismiss Petitioner's Retaliation Claims

The Fifth Circuit also correctly applied well-settled summary judgment standards to hold that Petitioner failed to raise a material fact issue on his Title VII retaliation claims. As with its analysis of Petitioner's failure-to-promote claim, the Fifth Circuit did not weigh material evidence, make credibility determinations, or refuse to draw justified inferences in Petitioner's favor. This is true with respect to Petitioner's retaliation claims based on both Respondent's denial of his request to transfer to Austin and Respondent's policy requiring Petitioner to move within the Beaumont district.[5]

The Fifth Circuit correctly concluded that Petitioner failed to present evidence sufficient to establish that the denied transfer to Austin was an adverse employment action. A "purely lateral transfer" that does not involve a demotion (or promotion), reduction (or increase) in pay, or "more than a minor change in working conditions," but, rather, involves only an employee's "subjective preference for one position over another" is not a materially adverse employment

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[5] The Fifth Circuit also correctly analyzed and affirmed dismissal of Petitioner's retaliation claim based on his purported termination from Respondent. Petitioner does not allege in his Petition that the Fifth Circuit misapplied the summary judgment standards with respect to this claim.

action under Title VII. *Nichols v. So. Ill. Univ.-Edwardsville*, 510 F.3d 772, 780-81 (7th Cir. 2007); *see also Brown v. Brody*, 339 U.S. App. D.C. 233, 199 F.3d 446, 455-56 (D.C. Cir. 1999) ("A survey of the relevant case law shows that the authority requiring a clear showing of adversity in employee transfer decisions is both wide and deep."). Petitioner offered no evidence that the transfer he sought from the assistant manager position in Beaumont to the same position in Austin would have involved any objective change in the terms and conditions of his employment.[6] This precluded Petitioner from proving that Respondent's denial of his Austin transfer request was an adverse employment action under the "materially adverse" standard announced in *White*. Therefore, Petitioner failed to offer evidence on an essential element of his *prima facie* case, and the Fifth Circuit correctly applied the well-established summary judgment standard to affirm dismissal of this retaliation claim pursuant to Rule 56.

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[6] The Petition does not allege that the Fifth Circuit overlooked objective evidence, such as increased pay or promotional opportunities, that would have established the adverse employment action element of his retaliation claim. Instead, Petitioner appears to allege that the Fifth Circuit misapplied established summary judgment principles by ignoring disputed allegations that the purely lateral transfer was discriminatory. (*See* Petition 12-13). These allegations, which might be relevant to a pretext analysis, are of no moment because they are immaterial to determining whether Petitioner presented sufficient evidence of an adverse employment action to make out a *prima facie* case.

The Fifth Circuit also correctly decided that Petitioner failed to raise a genuine issue of material fact as to whether Respondent's policy requiring managers to live within the Beaumont district (and within 25 miles of the Beaumont district office) was a pretext for retaliation. Petitioner alleged that this policy was pretextual on grounds that Respondent created the policy solely to harass him and, in fact, applied it only to him. Respondent, however, presented unrebutted testimony that this policy had been in place since the 1960s. Respondent also presented unrebutted evidence that every other Beaumont manager lived within the Beaumont district. Petitioner offered no evidence to dispute the existence of these material facts. Specifically, Petitioner did not present evidence disputing the existence of this company policy, or to dispute that it had been in place for more than 30 years. On this evidence, the Fifth Circuit properly analyzed the material facts and properly found no genuine issue of material fact that this company policy was a pretext for retaliating against Petitioner due to his complaints of discrimination.

III. THE COURT OF APPEALS' ANALYSIS AND ADJUDICATION OF PETITIONER'S WRONGFUL TERMINATION CLAIM DOES NOT CONFLICT WITH THE ESTABLISHED DOCTRINE OF CONSTRUCTIVE DISCHARGE

A. The Doctrine of Constructive Discharge Under Title VII is Solidly Established Across the Federal Courts, Including the Fifth Circuit

The recognition of constructive discharge claims under Title VII is universal. *See Pennsylvania State Police v. Suders*, 124 S. Ct. 2342, 2351-52 (2004). A Title VII constructive discharge claim in any federal court requires a plaintiff to prove "working conditions so intolerable that a reasonable person would have felt compelled to resign." *Suders*, 124 S. Ct. at 2354. This was the law in the Fifth Circuit prior to *Suders* and, to be sure, remains the law after *Suders*. *See, e.g.*, *Faruki v. Parsons S.I.P., Inc.*, 123 F.3d 315, 319 (5th Cir. 1997); *Lauderdale v. Tex. Dep't of Crim. Justice*, 512 F.3d 157, 167 (5th Cir. 2007).

In constructive discharge cases, the "[c]reation of a hostile work environment is a necessary predicate" to a claim of constructive discharge under Title VII.[7] *Suders*, 124 S. Ct. at 2356. The Fifth Circuit has

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[7] Petitioner plainly asserts that the basis of his constructive discharge claim is an alleged hostile work environment. (*See* Petition 17).

consistently interpreted this well-established rule to practically mean what it says: where a party's hostile work environment claim fails, so too must the overlaying constructive discharge claim. *See, e.g.*, *Weller v. Citation Oil & Gas Corp.*, 112 F.3d 710, 718-19 (5th Cir. 1996) ("Because [plaintiff-appellant] failed to present sufficient evidence to support her hostile work environment claim, her constructive discharge claim necessarily fails as well."); *Vallecillo v. HUD*, 155 F.App'x 764, 768 (5th Cir. 2005) ("We agree with the district court's reasoning that because Appellant's hostile work environment claim has failed, his constructive discharge claim must also fail."). This same principle of law is also widely recognized by other courts of appeals. *See, e.g.*, *Hernandez-Torres v. Intercontinental Trading, Inc.*, 158 F.3d 43, 47-48 (1st Cir. 1998) ("Because the jury . . . returned an adverse verdict on [plaintiff-appellant's] hostile work environment claim, he cannot succeed on his retaliatory constructive discharge claim."); *Schwapp v. Town of Avon*, 118 F.3d 106, 112 (2d Cir. 1997) (holding that the factual basis of a constructive discharge claim "rises or falls on the determination of the hostile work environment facts"); *Roney v. Ill. Dep't of Transp.*, 474 F.3d 455, 463 (7th Cir. 2007) ("Because we find that [plaintiff-appellant] was not subject to a hostile work environment, his claim of constructive discharge is automatically foreclosed."); *Brooks v. City of San Mateo*, 229 F.3d 917, 930 (9th Cir. 2000) ("Where a plaintiff fails to demonstrate the severe or pervasive harassment necessary to support a hostile work environment claim, it will be impossible for her to

meet the higher standard of constructive discharge: conditions so intolerable that a reasonable person would leave the job.").

The above-cited cases show that the rules of law which have developed under the Title VII constructive discharge doctrine are uniform and well-established. The Fifth Circuit did not abandon or depart from these established rules in the adjudication of Petitioner's wrongful termination claim. And, notwithstanding Petitioner's unfounded and confusing contention that the Fifth Circuit's resolution of this case conflicts with Supreme Court authority by punishing Petitioner's so-called "mitigation efforts," the decision in this case is fully consistent with *Suders*. Review by this Court is accordingly not justified under Supreme Court Rule 10, and the Petition should be denied in its entirety.

B. The Court of Appeals' Adjudication of Petitioner's Wrongful Termination Claim is Consistent With *Suders* and the Constructive Discharge Doctrine

The Fifth Circuit's decision to affirm summary judgment comports with *Suders* and the established doctrine of constructive discharge under Title VII. Petitioner is wrong in asserting that the Fifth Circuit's decision sets up a new contradictory standard that "if a person 'effectively quits' there can't be a wrongful discharge claim even if the employee was constructively discharged." (*See* Petition 17). A

cursory review of the opinion affirming summary judgment reveals that the Fifth Circuit did no such thing. To the contrary, the Fifth Circuit applied established law to resolve Petitioner's wrongful termination claim in favor of Respondent by holding: (1) that Petitioner was not terminated, but, rather, quit his job with Respondent[8] (App. 7a); and (2) that Petitioner failed as a matter of law to show the existence of a hostile work environment (App. 8a-9a).

As discussed above, the law across the federal courts is clear: a party cannot prove a constructive discharge claim without first establishing a predicate hostile work environment. *See, e.g.*, *Weller*, 112 F.3d at 718-19. The simple fact that the Fifth Circuit refrained from expressly stating this settled principle in affirming dismissal of Petitioner's wrongful termination claim did not, as Petitioner contends, thrust the Fifth's Circuit's law regarding constructive discharge into irreconcilable conflict with decisions of this Court and other courts of appeals. The Fifth Circuit correctly held that Petitioner failed to present evidence sufficient to maintain a hostile work environment claim. Therefore – by operation of firmly

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[8] The Fifth Circuit correctly held that Petitioner voluntarily quit his job with Respondent. The undisputed evidence shows: (1) Petitioner failed to return to work on March 8, 2001 when medically released; (2) Petitioner accepted employment with American National no later than March 19, 2001; and (3) Respondent sent Petitioner a letter on March 22, 2001 terminating his employment for his failure to return to work. (App. 2a-3a).

established law – the Fifth Circuit also correctly decided that Respondent was entitled to summary judgment on Petitioner's constructive discharge claim.

Even if Petitioner had raised a fact issue of a predicate hostile work environment, the Fifth Circuit equally could have affirmed the District Court's dismissal of the constructive discharge claim because Petitioner failed to exhaust his administrative remedies. Specifically, Respondent was also entitled to summary judgment because, as the District Court correctly held, Petitioner failed to submit a constructive discharge (or hostile work environment) allegation to the EEOC. (App. 25a); *see* 42 U.S.C. § 2000e-5(e).

CONCLUSION

For the reasons set forth herein, Respondent respectfully requests that Petitioner's request for a writ of *certiorari* to review the decision of the Fifth Circuit Court of Appeals be denied in its entirety.

Dated: July 1, 2008

Respectfully submitted,

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No. 07-1494

FILED
AUG 18 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

MEHRDAD SABZEVARI, PETITIONER

v.

THE RELIABLE LIFE INSURANCE COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Reply BRIEF

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INTRODUCTION

Respondent spends approximately 26 pages arguing against this Court granting certiorari, and yet it completely fails to address the heart of Petitioner's arguments. Respondent offers two Counter-Statements of Questions presented and yet it fails to offer any relevant arguments for this Court's consideration of the petition to grant certiorari. Finally, in an act of desperation, Respondent offers two alternatives for denying the certiorari petition, which were used by the District Court, that so flagrantly ignore the law that even the Fifth Circuit refused to use it in its opinion.

The two key questions for this Court are: i) whether there is competent summary judgment evidence that a jury could infer that Respondent violated Petitioner's Title VII rights; and ii) If an employee quits a position, must a court still consider whether the employee was constructively discharged. If the answer to the first question is yes, then the opinion from the Court of Appeals for the Fifth Circuit contradicts the law of the land, violates Petitioner's right to a trial by a jury of his peers and must be overturned by this Court. If the answer to the second question is yes, then the opinion from the Court of Appeals for the Fifth Circuit must be overturned, because it contradicts all of the law and opinions that pertain to constructive discharge.

Respondent's Statement of the Case

On page 1 of its Opposition Brief (hereinafter "Opposition"), Respondent accuses Petitioner of misleading this Court by using facts that are

"inaccura[te]," "immaterial" and of "omi[ting]... critical undisputed facts." After leveling such a charge, Respondent completely fails to support its incredulous allegations against the undersigned. As demonstrated below, it is actually the Respondent who is ignoring key undisputed facts and who is misleading this Court.

On page 3 of its Opposition, Respondent claims that Mr. Don Hirschfeld, made the decision to promote Mr. Doug Dixon. Claiming that Mr. Hirschfeld made the decision to promote Mr. Dixon is misleading, as Respondent has NEVER refuted the testimony that Mr. Grant Pillow was the ultimate decision maker and was the one who approved Mr. Dixon's promotion. (R. 457 and 500).

Also on page 3 of its Opposition, Respondent states that "Petitioner...admittedly does not believe that [Mr.] Hirschfeld discriminated against him in the selection process for the Sikeston Job...". The Sikeston job is the District Manager position that Mr. Dixon received. By focusing on this part of the testimony, Respondent is omitting the fact that Petitioner was told that decisions about promotions were made by Mr. Pillow and NOT Mr. Hirschfeld. (R. 457). Furthermore, Respondent is completely ignoring the statement by Petitioner's manager that the reason Mr. Dixon got the promotion was "because [Respondent] had more 'white managers' working for them." (Id.).

On page 4 of its Opposition, Respondent gives a long list of qualities that it claims "are indisputably central to the qualifications of a district manager." Once again this is misleading, as Respondent wants to compare apples to oranges. Petitioner is discussing the

qualifications of a District Manager. Mr. Pillow testified that there are "two important functions for [a District Manager]. One is taking care of the employees and policy holders and two, being able to recruit." (R. 501). Mr. Pillow went on to say that neither function was more important than the other. (Id.). Likewise, it has never been refuted that the person who made the ultimate decision, Mr. Pillow, stated that he would not want a District Manager that had a history of ethical violations, company rule violations OR a history of a lack of recruitment. (R. 501-3). Therefore, based on the undisputed testimony of the ultimate decision maker, to be **qualified** for a district manager a candidate must not have any of the following: a history of i) ethical violations; ii) company rule violations; or iii) a lack of recruitment.

Also on page 4 of its Opposition, Respondent claims that, "Petitioner did not receive the transfer to Austin that he requested." (Citing to page 325 of the record). Even ignoring that there is no such evidence on page 325 of the record, Respondent is completely omitting the fact that Petitioner's request to transfer back to Austin was in fact approved. (R. 458). It was only after Petitioner began raising his Title VII complaints and after Respondent instituted a policy of promoting Hispanics and African Americans over other races[1] that the transfer was withdrawn. (Id.). When Petitioner questioned why the transfer approval was being revoked, he was told by Mr. Mike Wheeler, Petitioner's

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[1] The undersigned humbly reminds this Court that it was Respondent's discriminatory policy that led to a consent decree being signed by Judge Werlien in EEOC v. The Reliable Life Insurance Company, Civil Action NO. H-03-01180.

regional manager at the time, that Petitioner was a traitor for raising his complaints and Mr. Wheeler threatened Petitioner's career. (Id.).

On page 5 of its Opposition, Respondent claims that, "the record contains no evidence that the Austin [transfer]...would have involved a change in...some...other objective aspect of Petitioner's employment with Respondent." However, Respondent completely omits the evidence that Petitioner was being subjected to a hostile environment in Beaumont and the objective evidence that i) Petitioner's evaluation took a "suspicious" downward trend; ii) Petitioner was called a traitor; iii) Petitioner's career was threatened; and iv) Petitioner was told to move within the district or be demoted. (R. 457, 531 and 458).

On page 6 of it Opposition, Respondent claims that Petitioner's charge of discrimination alleges "national origin discrimination and retaliation based on: (1) the denial of Petitioner's transfer...; and (2) Respondent's requests that Petitioner live within 25 miles of the Beaumont office...." However, the original charge also discusses Respondent's promotion practices. (R. 298). In fact, there was sufficient information in the charge that Respondent addressed Petitioner's failure to promote claim in its position statement. (R. 470-1).

On page 7 of it Opposition, Respondent repeats a completely unsupported charge that was raised in the Fifth Circuit. Respondent falsely claims that Petitioner "limited the scope of his retaliation claim to [the] denial of the transfer to Austin and his termination" in his response to Respondent's Amended Motion for Summary Judgment. Opposition page 7 fn1.

Respondent is misquoting the brief and thereby intentionally misleading this Court. Respondent has omitted the footnote that expressly states that "[t]his also does not include the hostile environment and the sudden decrease in Mr. Sabzevari's evaluation." (R. 448). Furthermore, in the very next paragraph Petitioner went on to say:

> Contrary to Defendant's allegation, Mr. Sabzevari's transfer to Austin was not a "purely lateral transfer." After being subjected to a hostile environment in Beaumont by being ostracized, labeled as a trouble maker (Other employees were told to stay away from Mr. Sabzevari if they wanted to keep their jobs.), and being told to move or be demoted, Mr. Sabzevari believed that moving to Austin would provide him a more secure future and one free of harassment.

(R. 448).

Reply to Respondent's Reasons for Denying Certiorari

I. Criteria of Supreme Court Rule 10 are satisfied.

Respondent's spends the majority of its Response trying to frame Petitioner's writ as nothing more than a factual dispute. On Page 12, it goes so far as to claim that "Practically speaking, Petitioner seeks certiorari for no other reason that to have this Court wade through the record in search of a genuine issue of material fact...that both the Court of Appeals and District Court could not find." However, this is not the

case. There are no factual disputes in a summary judgment. All disputed facts are to be taken in favor of the non-movant. *Adickes v. S.H. Kress &Co.*, 398 U.S. 144, 157, 90 S.Ct. 1598, 1608 (1970). What is amazing is that instead of applying the law to the facts presented in Petitioner's Petition for Writ of Certiorari, Respondent dismisses all the facts and makes conclusionary arguments that Petitioner has failed to raise a genuine issue of material fact. Without even attempting to apply the law to the facts, Respondent's arguments lack credibility and are not relevant to this Court's determination of whether to grant certiorari, as it did in *Reeves v. Sanderson Plumbing Products, Inc.*, to correct the Fifth Circuit's weighing of evidence, which denied Petitioner his 7th Amendment Right to a trial by a jury. 120 S.Ct. 2097 (2000).

II. The Court of Appeals failed to apply well settled law as Petitioner did raise a genuine issue of material fact on his failure to promote claim and retaliation claims.

A. There is a genuine issue of a material fact pertaining to Petitioner's failure to promote claim.

Respondent spends six and half (6½) pages discussing Petitioner's failure to promote claim. However, instead of addressing the evidence presented to the District Court and the Fifth Circuit that according to the ultimate decision maker, Mr. Dixon was disqualified to be a District Manager because Mr. Dixon had a history of ethical violations, company rule violations AND[2] a history of problems with recruiting.

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[2] According to Mr. Pillow any one of the problems would disqualify

Respondent relies on the conclusion of the Fifth Circuit that Petitioner failed to offer any "evidence of a company policy or past promotional decision to support the unfounded conclusion that these remote infractions forever rendered [Mr.] Dixon ineligible for a district manager position...." Opposition page 17. However, this is exactly what the evidence of Mr. Pillow does, it disqualifies Mr. Dixon because he had a history of being a problem employee[3]. A reasonable jury could infer from this evidence that Mr. Dixon was disqualified from the promotion. This would invalidate Respondent's proffered reason of the promotion of Mr. Dixon over Petitioner, and conclude as Petitioner's manager did, that the only qualification that Mr. Dixon had was that he was white.

B. There is a genuine issue of a material fact pertaining to Petitioner's retaliation claim.

Respondent's opposition to granting certiorari on Petitioner's retaliation claims stems from its belief that there is no evidence of an adverse employment action. Respondent concludes that the transfer to Austin was a purely lateral transfer and that Petitioner has offered no objective evidence to the contrary. Petitioner did offer the subjective evidence that he believed that his career would be more secure in Austin than in Beaumont and that a transfer would remove him from

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Mr. Dixon, and yet he was promoted when he had all three, and Petitioner had none.

[3] As this Court recalls, Mr. Dixon's problems were not remote and in fact he had been warned, right before he was promoted, that if his recruiting problems did not get resolved he would be placed on probation.

the hostile Beaumont environment. However, Petitioner also offered the objective evidence that after he raised his concerns i) Petitioner's evaluation took a "suspicious" downward trend; ii) Petitioner was called a traitor; iii) Petitioner's career was threatened; and iv) Petitioner was told to move within the district or be demoted. (R. 457, 531 and 458). Furthermore, Petitioner's subjective belief is also supported by the fact that within a few months of raising his complaints, he was no longer working for Respondent.

Respondent only addresses Respondent's demand that Petitioner move closer to the district or be demoted. Opposition page 21. However, this move or be demoted policy was supported only through verbal testimony of current employees of Respondent. The verbal move or be demoted policy relied on by the Respondent and the Fifth Circuit, was and is disputed by Petitioner. By taking the Respondent's oral version over Petitioner's testimony, the Fifth Circuit improperly weighed the testimony and rejected Petitioner's version. However, a reasonable jury could believe Petitioner and infer that the demand for Petitioner to move was in direct response to his raising Respondent's Title VII violations. Therefore, the Fifth Circuit, without even addressing this evidence, violated the law of the land and this Court must grant certiorari and reverse the Firth Circuit's opinion.

III. The Court of Appeals failed to analyze Petitioner's wrongful termination claim under the doctrine of Constructive Discharge.

Once again Respondent is missing the heart of Petitioner's argument. Petitioner argues that he was

fired, but that if he "quit" he was constructively discharged, as no reasonable person would continue working in such a hostile environment. Respondent argues that Petitioner quit. The Fifth Circuit agreed with Respondent and ruled that Petitioner effectively quit. However, the Fifth Circuit ended its analysis at determining that Petitioner effectively quit. Petitioner's argument is that under the constructive discharge doctrine, the Fifth Circuit should have to consider whether a reasonable person would have continued working in such a hostile environment[4]. Since Petitioner did present competent summary judgment evidence, that a reasonable jury could infer that he was subjected to a hostile work environment, the Fifth Circuit's opinion contradicts the law of the land regarding constructive discharge and must be overturned.

IV. Petitioner's failure to promote and wrongful discharge claims were before the Equal Employment Opportunity Commission.

Respondent argues that there are alternate grounds to deny the Writ of Certiorari in that the Fifth Circuit could have affirmed the granting of summary judgment on the same basis of the District Court. (Opposing Brief, pages 18 and 26). Respondent argues that the District Court correctly held that Petitioner did not timely submit his failure to promote claim or wrongful discharge claim to the EEOC. This argument is not based on the law or facts of this case.

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[4] Petitioner does not dispute that if the trier of fact determines that Petitioner was not subjected to hostile environment, he cannot maintain a constructive discharge claim.

The claims before the District Court were not limited to the "exact charge" filed with the EEOC. *Young v. City of Houston, Texas*, 906 F.2d 177, 179 (5th Cir. 1990). Any claims that reasonably flowed from the EEOC investigation of the Petitioner's EEOC charge were properly before the District Court. Id. The purpose of the charge is to provide notice of a complaint, promote voluntary compliance and conciliation of disputes. *Martin v. The Kroger Co.*, 65 F.Supp.2d 516, 537 (S.D. Tex. 1999).

Contrary to Respondent's argument, Petitioner's discriminatory promoting practices were part of the charge (R. 92). In fact, Respondent addressed Petitioner's failure to promote claim in its position statement. (R. 471). Respondent's position statement was followed by Petitioner's response and also discusses his complaints about the failure to promote him. (R. 477). If there was any question that failure to promote was part of Petitioner's EEOC charge, there is no doubt that it stemmed from the EEOC investigation when all parties addressed the issue during the investigation.

Likewise, Petitioner's discharge reasonably flowed from the EEOC investigation. Petitioner provided the EEOC with information about his discharge when he filed his complaint and during the EEOC's investigation. (R. 458). All the evidence surrounding Petitioner's termination was provided to the EEOC in the form of the various communications between the undersigned and Respondent from February through March of 2002. Therefore, Petitioner's discharge was

properly before the District Court as it reasonably flowed from the EEOC's investigation.

If the Fifth Circuit had affirmed the District Court's decision on this ground it would have ignored over 40 years of case law from the 5th Circuit alone. See *Sanchez v. Standard Brands, Inc.*, 431 F.2d 455, 466 (5th Cir. 1970). *Clark v. Kraft Foods*, Inc., 18 F.3d 1278, 1280 (5th Cir. 1994); *National Association of Government Employees v. City Public Service Board of San Antonio, Texas*, 40 F3d 698, 711-12 (5th Cir. 1994); *Thomas v. Tex. Dep't of Criminal Justice*,220 F.3d 389, 395 (5th Cir. 2000); *Perseveranda Clayton v. Rumsfeld*, 106 Fed. Appx. 268, 271, 2004 U.S. App. Lexis 16011 (5th Cir. 2004)(unpublished); *Pacheco v. Norman Y. Mineta, Etc.*, 448 F.3d 783, 789 (5th Cir. 2006); *O'Neal v. Roadway Express*, 181 Fed. Appx. 417, 419: 2006 U.S. App. Lexis 11688(5th Cir. 2006)(unpublished); *Preston v. Texas Department of Family and Protective Services*, 2007 U.S. App. Lexis 2870, 7 (5th Cir. 2007)(unpublished); and *Mayfield v. US Department of Veterans Affairs*, 2007 U.S. Dist. Lexis 13318, 15 (5th Cir. 2007). It would also have contradicted case law from other circuits. See *Obradovich v. Federal Reserve Bank of New York*, 569 F.Supp. 785, 789 (S.D. of N.Y., 1983)(citing *Silver v.Mohasco Corp.*, 602 F.2d 1083, 1090 (2nd Cir. 1979), rev'd on other grounds, 447 U.S. 807, 100 S.Ct. 2486 (1980) quoting *Smith v. American President Lines, Ltd.*, 571 F.2d 102, 107 n.10 (2nd Cir. 1978)) and *Belcher v. Bassett Furniture Industries, Inc.*, 376 F.Supp. 593, 596 (W.D. Virginia 1974).

Respondent's alternative argument to deny certiorari is merely a smoke screen, as even the Fifth

Circuit recognized the weakness of this argument by failing to address it.

CONCLUSION

Other than attempting to cloud all the issues, Respondent completely fails to explain why the evidence submitted by Petitioner would not allow a jury to infer that his rights had been violated. Therefore, for all the foregoing reasons, and the reason specified in Petitioner's Petition for writ of certiorari, Petitioner respectfully requests that the Supreme Court grant certiorari, vacate the decision of the United States Court for the Fifth Circuit, remand this matter to the district court for a trial on the merits and for such other and further relief that Petitioner may be entitled.

Respectfully submitted,

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